Supreme Court, U.S.
FILED

10-837 DEC 21 2010

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

UNITED STATES OF AMERICA
ex rel. KENNETH L. SMITH,
Petitioner,

v.

HON. STEPHEN H. ANDERSON, *et al.*,
Respondents,

On Petition For Writ Of Certiorari
To The United States Court Of
Appeals For The Tenth Circuit

Kenneth L. Smith,
as Relator
in propria persona
23636 Genesee Village Rd.
Golden, Colorado 80401
(303) 526-5451

QUESTIONS PRESENTED

1. Does the citizen have legal authority to enforce the Article III Good Behavior Clause in federal court, in a manner consistent with five centuries of common-law precedent?

2. Did adoption of the Ninth and Tenth Amendments elevate the citizen's ancient common law right to initiate private criminal prosecutions to the status of a constitutionally guaranteed right -- which may not be abridged by mere legislative fiat or judicial decree?

OTHER PARTIES TO THE PROCEEDING

The Respondents are initial defendants who participated in the appeal in the Tenth Circuit: Hons. Stephen H. Anderson, Robert R. Baldock, Robert E. Blackburn, Mary Beck Briscoe, Paul J. Kelly, Jr., Marcia S. Krieger, Stephanie K. Seymour, Deanell Reece Tacha, in their personal capacities, and Wiley Y. Daniel, in his official capacity as Chief Judge for the United States District Court for the District of Colorado. Hons. Michael W. McConnell and Robert H. Henry have left the bench during the pendency of this matter and accordingly, any action taken with respect to them would by definition be moot.

TABLE OF CONTENTS

QUESTIONS PRESENTED

OTHER PARTIES TO THE PROCEEDING

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

STATEMENT OF THE CASE 13

SUMMARY OF PERTINENT FACTS 18

REASONS FOR GRANTING REVIEW 20

I. In the Absence of These Essential Safe-Guards of Ordered Liberty, the "Rule of Law" Becomes the Rule of Men 21

II. The Framers Intended That Citizens Be Empowered to Enforce Article III Good Behavior Tenure 30

III. The Victim's Right To Prosecute Crimes Committed Against Him Was Retained By the People 42

CONCLUSION 53

EXHIBITS 57

TABLE OF CASES AND AUTHORITIES

CASE	PAGE
Alden v. Maine, 527 U.S. 706 (1999)	34
Bell v. United States, 349 U.S. 81 (1955)	38
Blyew v. United States, 80 U.S. 581 (1871)	16
Board of County Commissioners v. Umbehr, 518 U.S. 668 (1996)	14
Bodell v. Walbrook Ins. Co., 119 F.3d 1411 (9th Cir. 1997)	48
Caperton v. A. T. Massey Coal Co, 129 S.Ct. 2252 (2009)	19
Carey v. Piphus, 435 U.S. 247 (1978)	15
Cohens v. Virginia, 19 U.S. 264 (1821)	29
Cooper v. Aaron, 358 U.S. 1 (1958)	13
Dare v. California, 191 F.3d 1167 (9th Cir. 1999)	54
Diblasio v. Novello, 344 F.3d 292 (2d Cir. 2003)	54
Dist. of Columbia v. Heller, No. 07-290, 554 U.S. ___ (2008)	42
District of Columbia Ct. of Appeals v. Feldman, 460 U.S. 462 (1983)	18
Georgia v. Brailsford, 3 U.S. 1 (1794)	34
Hans v. Louisiana, 131 U.S. 1 (1890)	14, 52
Harcourt v. Fox [1692] 1 Show. 426 (K.B.)	32
Head Money Cases, 112 U.S. 580 (1884)	52
Heiner v. Donnan, 285 U.S. 312 (1932)	13
In re Smith, 10 F.3d 723 (10th Cir. 1993)	19
In re Application of Wood to Appear Before Grand Jury, 833 F.2d 113 (8th Cir. 1987)	14
Jarrolt v. Moberly, 103 U.S. 580 (1880)	38

CASE PAGE

Kawananakoa v. Polyblank,
205 U.S. 349 (1907) 52
Kendall v. United States, 37 U.S. 524 (1838) . . 16
Köbler v Austrian Republic,
3 CMLR 28 (2003) (European Union) 52
Maharaj v. Attorney-General of Trinidad & Tobago (No. 2), A.C. 385 (1979) 52
Marbury v. Madison, 5 U.S. 137 (1803) . . . . various
McCullough v. Maryland, 17 U.S. 316 (1819) . . 38
Morrison v. Olson, 487 U.S. 654 (1988) 49
Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 40
Olmstead v. United States,
277 U.S. 438 (1928) 20
Pierson v. Ray, 386 U.S. 547 (1967) 52
Reid v. Covert, 354 U.S. 1 (1957) 46
Rex v. Toly [1794] 73 ER 436 (K.B.) 29
Ricci v. DeStefano, No. 07-1428,
557 U.S. ___ (2009) 16
Richards v. City of Topeka,
173 F.3d 1247 (10th Cir. 1999) 54
Smith v. Bender, No. 09-cv-1003 (10th Cir. Sept. 11, 2009) (unpublished) 19
Smith v. Krieger, No. 09-1503 (10th Cir. Jul. 27, 2010) (unpublished) 41
Smith v. Mullarkey, 67 F.App'x. 535 (10th Cir. Jun. 11, 2003) 18
Smith v. Mullarkey, 121 P.3d 890 (Colo. 2005) (per curiam) 18

CASE	PAGE
State Oil Co. v. Khan, 522 U. S. 3 (1997)	19
Tumey v. Ohio, 273 U.S. 510 (1927)	19
United States v. American Bell Tel. Co., 28 U.S. 315 (1888)	33
United States v. Brandt (The Medical Case), 2 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, (1949)	50
United States v. Cox, 342 F.2d 167 (5th Cir. 1965)	49
United States ex rel. Smith v. Anderson, No. 10-1012 (10th Cir. Jul. 27, 2010) (unpublished)	40
United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955)	40, 41
United States v. Lee, 744 F.2d 1124 (5th Cir. 1984)	26
United States v. Meyers, 200 F.3d 715, (10th Cir. 2000)	19
United States v. Sandford, F.Cas. No. 16,221 (C.Ct.D.C. 1806)	47
United States v. Stanley, 483 U.S. 669 (1987)	49
United States v. Wilson, 32 U.S. 150 (1833)	31
Weinberger v. Rossi, 456 U.S. 25 (1982)	52
Wisconsin v. Allen, No. 2010-WI-10 (Wis. 2010)	39
Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987)	15

CONSTITUTIONS AND STATUTES

	PAGE
2&3 Edw. 6, c. 8, §13 (Eng. 1540)	31
18 U.S.C. §§ 3-4	24
18 U.S.C. § 242	29
18 U.S.C. § 2340	23
28 U.S.C. § 1651	15
42 U.S.C. § 12132	54
Act of Settlement [1701], 12 & 13 Will. 3, c. 2, §3	35
Bill of Rights [1688] c.2 1 W. & M. Sess. 2	44
Bill of Rights, Preamble (U.S. 1791)	43
Constitución Espanola de 1978 (Spain 1978)	51
Costituzione della Repubblica Italiana art. 112 (Italy 1947)	51
Fed. R. Civ. P. 81(b)	15
Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277	23
Magna Carta ¶ 61 (1215)	44
N.J. Const. of 1776, art. XII (1844)	47
N.Y. Const. of 1777 art. XVII (1821)	48
N.Y. Const. of 1777 art. XIX (1821)	48
Pa. Const. of 1776 § 3 (1790)	48
Pa. Const. of 1776 § 20 (1790)	47, 48
U.S. Const. art. I, § 2, cl. 5	36
U.S. Const. art. II, § 4	13
U.S. Const. art. III, § 1	30
U.S. Const. art. VI, cl. 2	52
U.S. Const, amend. IX	46
U.S. Const, amend. X	46

OTHER AUTHORITIES

PAGE

A Conversation with Justice Clarence Thomas, 36 *Imprimis* 10, Oct. 2007 21

Amanze-Nwachuku, Chika, Halliburton May Pay $500m to Keep Cheney Out of Court, *This Day*, Dec. 10, 2010 25

Annals of Congress, Vol. 1 (1789) 44, 45

Barra, Allen, The U.S. v. Roger Clemens, *Wall St. J.com*, Aug. 28, 2010 26

Barrymore Facing Pool Death Case *BBC News*, Jan. 16, 2006 51

Barnett, Randy, *Restoring the Lost Constitution: The Presumption of Liberty* (2004) 46

Bazell, Robert, U.S. Apologizes For Guatemala STD Experiments, NBC.com, Oct. 1, 2010 . 49

Berger, Raoul, *Impeachment: The Constitutional Problems* (Harvard U. Pr. 1974) . . various

Blackstone, William, Commentaries on the Laws of England (1765) . . . . . various

Chacon, Arnold A., Spain, Attorney General Recommends Court Not Pursue GTMO Criminal Case vs. Former USG Officials, Memo (to Sec'y. of State Hillary Clinton, *et al.*), Apr. 17, 2009 28

Charges Against Spanish Investigative Judge Must be Dropped, *Amnesty Int'l.*, Apr. 21, 2010 28

Coke, Edward, Institutes of the Laws of England (1644) 32, 34

PAGE

Congressional Record, Vol. 138 (1992) 52
Corn, David, Obama and GOPers Worked Together to Kill Bush Torture Probe, MotherJones.com, Dec. 1, 2010 28
Duffy, Helen, The "War On Terror" and the Framework of International Law (Cambridge Pr. 2005) 25
Elliot, Jonathan, Debates on the Federal Constitution (1836) . . . . . various
Feinman, Jay M., and Cohen, Roy S., *Suing Judges: History and Theory*, 31 S.Car. L. Rev. 201 (1980) 35
Geyh, Charles, *When Courts and Congress Collide: The Struggle for Control of America's Courts* 160 (U. Mich. Press 2008) 37
Holland, Justin, A Different Legal System for the Rich: Imagine Getting Off Easy for Hit-and-Run Because You Run a Hedge Fund, *Alternet*, Nov. 24, 2010 22
International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (March 23, 1976) . 51
Jefferson, Thomas, Letter (to Edmund Pendleton), Aug. 26, 1776 34
Jescheck, Hans-Heinrich, *The Discretionary Powers of the Prosecuting Attorney in West Germany*, 18 Amer. J. Comp. L. 508 (1970) . 51
Johnson, Carrie, No Charges In Destruction Of CIA Interrogation Tapes, *npr.org*, Nov. 9, 2010 26

PAGE

Kagan, Elena, *Richard Posner, the Judge*, 120 Harv. L. Rev. 1121 (2007) 40
Lira, Gonzalo, Is the U.S. a Fascist Police-State?, *Zero Hedge* (blog), Jun. 25, 2010 . . 26
Masters, Brooke, Martha Stewart Sentenced to Prison, *Wash. Post*, Jul. 17, 2004 26
Meek, James, 'They Beat Me From All Sides', *The Guardian*, Jan. 14, 2005 23
Montesquieu, *The Spirit of Laws* (1748) 36
New York Times Magazine, Nov. 14, 1965 . . 25
Prakash, Saikrishna, and Smith, Steve D., *How to Remove a Federal Judge*, 116 Yale L.J. 72 (2006) 15, 33
Ploscowe, Morris, *The Development of Present-Day Criminal Procedures in Europe and America*, 48 Harv. L. Rev. 433 (1935) 47
Posner, Richard A., *How Judges Think* (Harvard U. Pr. 2008) 39, 40
Reagan, Ronald, Speech (Proclamation of Human Rights Day), Dec. 10, 1987 20
Senate Committee on Foreign Relations, Report on the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 23 (102d Sess. 1992) 53
Smith, R. Jeffrey, Bush Says In Memoir He Approved Waterboarding, *Wash. Post*, Nov. 3, 2010 25

PAGE

Stein, Jeff, Leaked Cable: U.S. Warned Germany Against Arrests in Masri Case, *Wash. Post*, Nov. 29, 2010 23
Stein, Sam, Kagan: In *Bush v. Gore*, Court Was Affected By Politics and Policy, *Huffington Post*, May 19, 2010 13
Steinberg, Allen, *"The Spirit of Litigation": Private Prosecution and Criminal Justice in Nineteenth Century Philadelphia*, 20 J. Social History 231 (1986) 48
Suetonius, *The Lives of the Twelve Caesars* (trans. A. Thomson; Bell, 1893) 14
The Federalist (I. Kramnick ed. 1987) 34, 38
Timken, TR, Al-Masri Case -- Chancellery Aware of USG Concerns, Memo (to Secy. of State Condoleeza Rice), Feb. 7, 2007 27
United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (Dec. 10, 1984) 23
United States Dept. of State, Core Document Forming Part of the Reports of States Parties, United Nations Document No. HRI/CORE/USA/2005 (Jan. 16, 2005) 52
Wallach, Evan, Waterboarding Used to Be a Crime, *Wash. Post*, Nov. 4, 2007 26
White, Josh, Reservist Sentenced to 3 Years for Abu Ghraib Abuse, *Wash. Post*, Sept. 28, 2005 24

OPINIONS BELOW

A copy of the unpublished opinion of the Court of Appeals for the Tenth Circuit, styled *Smith v. Krieger*, No. 09-1503 (10th Cir. Jul. 27, 2010) due to consolidation at the appellate level, is included in the Appendix to this Petition at p. 59. A copy of the order entered in the United States District Court for the District of Colorado is at p. 89.

STATEMENT OF JURISDICTION

Jurisdiction exists pursuant to 28 U.S.C. §1254(1). Relator's timely-filed petition for rehearing en banc was denied on September 23, 2010; this petition is considered timely filed when mailed on or before December 22, 2010.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, section 2, clause 5 of the United States Constitution states:

> The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Article II, Section 4 of the Constitution states:

> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III, section 1, of the Constitution states:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Article VI, clause 2, of the Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Preamble to the Bill of Rights provides, in pertinent part:

> THE Conventions of a number of the States having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best insure the beneficent ends of its institution.

The Ninth Amendment to the Constitution states:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Tenth Amendment to the Constitution states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

STATEMENT OF THE CASE

While still a civilian, Justice Kagan summarized the problem this action attempts to rectify: **Federal Judges have appointed themselves absolute dictators**,[1] dispensing a personal brand of *ad hoc, ex post facto* justice under the guise of interpreting the law. This is a "flagrant perversion of the judicial power," *Heiner v. Donnan*, 285 U.S. 312, 331 (1932), tantamount to open "war against the Constitution," *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) -- a war this Court has encouraged, through its persistent failure to adequately supervise our nation's inferior courts.

At essence, Relator asks this Court two simple, straightforward questions: If Article III judges can only be removed from office via impeachment, and judges can only be impeached for acts of "Treason, Bribery, or other high Crimes and Misdemeanors," U.S. Const. art. II, § 4, *why does the Good Behavior Clause even exist?* Second, had the Framers stated explicitly that the people would have to rely on the government to protect us from abuses of power by the government, would *anyone in their right mind* have ratified their Constitution?

---

[1] Ms. Kagan used the more euphemistic "Platonic Guardians," even though "benevolent dictators" exist only in theory. Sam Stein, Kagan: In *Bush v. Gore*, Court Was Affected By Politics and Policy, *Huffington Post*, May 19, 2010.

It's bad enough when this Court does it, *see e.g.*, *Hans v. Louisiana*, 131 U.S. 1 (1890) (rewriting the Eleventh Amendment), *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting), but when lower courts indulge, and this Court fails to attend to its duty to rebuke them, our predicament as citizens becomes worse than that of the unfortunate subjects of Caligula[2]: **We can read the laws until we go blind, but we can't rely on them.** We endure a regime of "unknowable law," where even hidebound pronouncements of this Court barely qualify as polite suggestions.

In the face of lower court judges openly and notoriously defying the established pronouncements of this Court, Relator Kenneth Smith sought to enforce the Article III Good Behavior Clause and to present evidence of felonious conduct by the judges in question to a federal grand jury. *See In re Application of Wood to Appear Before Grand Jury*, 833 F.2d 113 (8th Cir. 1987). These actions were necessitated by this Court's knowing abdication of its duty to ensure

---

[2] As Suetonius records, the Roman emperor Caligula imposed taxes on food, lawsuits, and wages, but did not publish his tax laws; as a result, "great grievances were experienced from the want of sufficient knowledge of the law. At length, on the urgent demands of the Roman people, he published a law, but it was written in a very small hand, so that no one could make a copy of it." Suetonius, *The Lives of the Twelve Caesars* 280 (trans. A. Thomson; Bell, 1893), Ch. 4, § LXI.

that the "law" it declares is applied consistently by inferior courts. As these actions were traditionally taken *ex relatione*, and Smith brought these actions in a relational capacity.

These are matters of first impression in this Court. In a footnote in his *Young* concurrence, Justice Scalia acknowledged that the question of whether the Constitution's vesting of the executive power in the President precludes private prosecution of federal crimes has never been resolved, *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 816 and n. 2 (1987) (Scalia, J., concurring in part), and no court has considered whether a citizen may enforce the Good Behavior Clause.[3] *See* Saikrishna Prakash and Steve D. Smith, *How to Remove a Federal Judge*, 116 Yale L.J. 72 (2006).

In light of the Wikileaks "dump" of State Department cables, **this case raises questions with wide-ranging and pressing importance to the nation as a whole**. In prosecution of the global war on terror, many of our highest-ranking officials have become war criminals. But they remain immune from criminal sanction, because a servile, corrupt, and even *racist* Department of Justice has reserved the right

---

[3] At common law, good behavior tenure was enforced through the writ of *scire facias*. Although that writ was technically abolished, Fed. R. Civ. P. 81(b), relief in the nature of scire facias is still available. Id., 28 U.S.C. § 1651.

to pick and choose which parts of the United States Code it will enforce in its courts. If the relief sought by Relator is granted, human rights groups throughout the nation will have the power to bring our own Pinochets to heel. Conversely, if it is not, American "citizens" are little more than serfs, branded with a "badge of slavery." *Blyew* v. *United States*, 80 U.S. 581, 599 (1871) (Bradley, J., dissenting).

The legal equation is simple and straightforward: If as will be shown, the rights to private prosecution and enforcement of the Good Behavior Clause by an aggrieved citizen were incorporated into the Constitution, they must be made available upon demand.

Justice Alito proclaims that we have a right to "demand ... evenhanded enforcement of the law." *Ricci* v. *DeStefano*, No. 07-1428, 557 U.S. ___ (2009) (Alito, J., concurring; slip op., at 13). As a demand that can draw on no force to support it is a contradiction in terms, the law must provide adequate legal force, or concede a citizen's right to use lethal force as s/he sees fit. As the Framers most certainly did not intend the latter, the right to an adequate and effective remedy at law must be made available, as it is "a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist." *Kendall* v. *United States*, 37 U.S. 524, 624 (1838).

A. Summary Of the Legal Argument

The Good Behavior Clause of Article III defines the judicial power by defining the offenses for which a judge may be removed from office: abuse of office, nonuse of office, willful refusal to exercise the office, and "tyrannical partiality." As "good behavior" is a term of legal art borrowed from the English common law, English precedent defines its contours. At common law, the lowliest of commoners could remove an agent of the Crown from office for violating the conditions of his office, pursuant to a writ of *scire facias*, upon a trial on the merits. As violations of good behavior tenure are not necessarily impeachable offenses, the Framers intended there to be two separate legal mechanisms for removing a corrupt or tyrannical judge from the bench, and that good behavior tenure can be enforced by the citizen.

The purpose of the Bill of Rights was to preserve the traditional rights of Englishmen, in perpetuity, as against the new federal government. One of the most important of these was the right to criminally prosecute anyone, including public officials, who has committed a crime against you. As this right was reserved to the people under the Tenth Amendment, and no sane person would have willingly ratified the Constitution without preserving this essential safeguard of liberty, our courts have no constitutional warrant for interpreting it out of existence.

SUMMARY OF THE FACTS

Relator approached our nation's courts in good faith, operating under the wildly-mistaken assumption that most federal judges were honorable souls, who actually *tried* to conscientiously apply the law of the land to the facts of every case. Jaw-dropping opinions, like this one from Defendant Stephen Anderson, quickly disabused him of that puerile notion:

> [Smith] filed a complaint in federal district court setting forth twenty claims for relief for alleged violations of federal law and of plaintiff's constitutional rights. *Plaintiff sought declarations that the Colorado bar admission process and certain admissions rules were unconstitutional...*

Smith v. Mullarkey, 67 F.App'x. 535 (10th Cir. Jun. 11, 2003), slip op. at 4 (emphasis added). As any competent judge should know, the italicized text was Smith's non-refundable ticket to federal court. *District of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462, 482-83 (1983). As such, the Tenth Circuit wrote "designer law," applicable to Smith and only to Smith, thereby depriving him of rights available to every other citizen.

Smith has been subjected to an fusillade of outrageously irregular court decisions, including one in which state supreme court justices purported to

decide a case despite the fact that they were proper party defendants in tort, and sixteen 'non-conflicted' judges were available and authorized by statute to hear it. *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005) (per curiam); *cf., Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (stating that this violated the Fourteenth Amendment); *see Caperton v. A. T. Massey Coal Co*, 129 S.Ct. 2252 (2009) (reaffirming *Tumey*). As that action was a stand-alone due process violation, and the right to procedural due process is "absolute," *Carey v. Piphus*, 435 U.S. 247, 266 (1978), Smith was entitled to be heard in federal court pursuant to 42 U.S.C. § 1983. But the courts of the Tenth Circuit, in defiance of binding United States Supreme Court decisions and their own published precedent, have willfully and repeatedly refused to hear his claims. *E.g., Smith v. Bender*, No. 09-cv-1003 (10th Cir. Sept. 11, 2009) (unpublished); *cf., Carey, supra*. As it is well-established that only this Court has the authority to overrule one of its precedents, *State Oil Co. v. Khan*, 522 U. S. 3, 20 (1997), and no Panel of the Tenth Circuit may overrule its own precedent, *In re Smith*, 10 F.3d 723, 734 (10th Cir. 1993) (meaning of binding precedent); *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000) (Panels must follow reasoning of prior Panels), the Defendants' actions were prima facie unlawful ... but being a federal judge means never having to say you're accountable.

REASONS FOR GRANTING REVIEW

> *In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself.*[4]

In chiding the Soviet Union, President Reagan observed that some governments "make elaborate claims that citizens under their rule enjoy human rights," ... but "[e]ven if words look good on paper, the absence of structural safeguards against abuse of power means they can be taken away as easily as they are allowed." Ronald Reagan, Speech (Proclamation of Human Rights Day), Dec. 10, 1987. Little did he know just how closely our own country would come to resemble that remark.

The Framers designed a Constitution containing all the common-law safeguards against tyranny that they enjoyed as Englishmen, but had been impaired by King George III. But as Justice Thomas rightly

---

[4] *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

observes, erosion of these safeguards is inimical to liberty, as "it was the structure of the government that was supposed to protect our liberty. And what has happened through the years is that the protections afforded by that structure have been dissipated." A Conversation with Justice Clarence Thomas, 36 *Imprimis* 10, Oct. 2007, at 6.

I. IN THE ABSENCE OF THESE ESSENTIAL SAFEGUARDS OF LIBERTY, THE "RULE OF LAW" BECOMES THE RULE OF MEN.

A. Justice May Be Blind, But She Can Sure Smell Money.

In July of this year, liver surgeon Steven Milo was riding his bicycle on a Colorado road when he was struck from behind by a Mercedes.

> "The driver of the Mercedes took off, stopping later not to call for help for Milo, left bleeding at the scene, but for service for his damaged luxury sedan. In Milo's words, the man "fled and left me for dead on the highway," a serious felony."
>
> Or it would be if you or I had committed the offense. But the driver that day was 52-year-old Martin Joel Erzinger, a Morgan Stanley Smith Barney money manager who oversees

> more than a billion in assets for "ultra high net worth individuals, their families and foundations."

Joshua Holland, A Different Legal System for the Rich: Imagine Getting Off Easy for Hit-and-Run Because You Run a Hedge Fund, *Alternet*, Nov. 24, 2010, http://www.alternet.org/story/148964/. Local District Attorney Mark Hurlbert refused to charge Erzinger with a felony, claiming that "'[f]elony convictions have some pretty serious job implications for someone in Mr. Erzinger's profession,' Hurlbert said, 'and that entered into [the decision].'" Id.

Coloradans need not *imagine* the absurdity of a criminal law that only applies to commoners; *they live it*.

B. Justice May Be Blind, But She Can Sure Sense Power.

Khaled el-Masri was a law-abiding German car salesman of Lebanese descent, intent on enjoying a holiday in Macedonia. He was seized by police,

> held incommunicado for weeks without charge, then beaten, stripped, shackled and blindfolded and flown to a jail in Afghanistan, run by Afghans but controlled by Americans. Five months after first being seized, he says,

> still with no explanation or charge, he was flown back to Europe and dumped in an unknown country which turned out to be Albania.

James Meek, 'They Beat Me From All Sides', The Guardian, Jan. 14, 2005, http://www.guardian.co.uk/world/2005/jan/14/usa.germany. Welcome to the 'Global War on Terror', where *existing while Muslim* has become a crime.

As coercive interrogation is construed as torture under international law, United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027; 18 U.S.C. § 2340,[5] German authorities issued arrest warrants for el-Masri's captors; domestic authorities had a duty to prosecute in lieu of extradition. CAT, art. 7, § 1. But instead of discharging this duty, our State Department actively pressured their German counterparts into not seeking international arrest warrants requiring extradition, according to a secret diplomatic cable recently released by Wikileaks. Jeff Stein, Leaked Cable: U.S. Warned Germany Against Arrests in Masri Case, *Wash. Post*, Nov. 29, 2010.

---

[5]Though not self-executing, CAT was implemented domestically via the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681, and regulations promulgated thereunder.

As such, diplomat John Koenig (and presumptively, then-Secretary of State Dr. Condoleeza Rice) has not only obstructed German justice but also, aided and abetted the commission of war crimes. 18 U.S.C. § 3; see also, e.g., 18 U.S.C. § 4 (misprision of felony). This is, of course, in stark contrast to the fate of Pfc. Lynndie R. England of Abu-Ghraib fame. See, Josh White, Reservist Sentenced to 3 Years for Abu Ghraib Abuse, *Wash. Post*, Sept. 28, 2005.

Americans need not *imagine* the absurdity of a criminal law that only applies to commoners; *they live it.*

C. The Status Quo Places Every American At Risk.

> *In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.*[6]

As Ronald Reagan once quipped, "Government is like a baby. An alimentary canal with a big appetite at one end and no responsibility at the other." *New*

---

[6] The Federalist No. 51, 320 (James Madison) (I. Kramnick ed. 1987) (italicized for stylistic purposes).

York Times Magazine, Nov. 14, 1965, at 174. And at times, it needs to be *spanked*.

Over the past two centuries, our government has arrogated unto itself an exclusive franchise over the prosecution of criminal offenses. And predictably, it won't spank itself ... but anyone impertinent enough to challenge its hegemony will be thrashed to within an inch of his life. America has yet to descend to the depravity of Nigeria (where, apparently, the way to avoid a bribery prosecution is to pay *a really, really big bribe*, Chika Amanze-Nwachuku, Halliburton May Pay $500m to Keep Cheney Out of Court, This Day, Dec. 10, 2010, at http://www.thisdayonline-.info/view.php?id=189658), but resort to the news of the day reveals that increasingly, that distinction is one without a difference. *Ask Julian Assange....*

By way of example, President George W. Bush is now a self-confessed war criminal.[7] *See* R. Jeffrey Smith, Bush Says In Memoir He Approved Water-

---

[7] President Bush's confession does not extend to an admission that he initiated a "war of aggression" which, according to the Nuremburg Tribunal, "is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole." Judgment of the Nuremburg International Tribunal, Sept. 30, 1946, reprinted in, Helen Duffy, *The "War On Terror" and the Framework of International Law* 86 & n. 74 (Cambridge Pr. 2005).

boarding, *Wash. Post*, Nov. 3, 2010, at A-2. In the aftermath of World War II, we prosecuted Japanese soldiers for waterboarding our boys, Evan Wallach, Waterboarding Used to Be a Crime, *Wash. Post*, Nov. 4, 2007 at B-1, and a Texas sheriff and three deputies for waterboarding a prisoner. *See United States v. Lee*, 744 F.2d 1124 (5th Cir. 1984). Yet, our Department of Justice has refused to prosecute the former President -- despite his own damning public admissions. Further, it has refused to prosecute Central Intelligence Agency operatives for spoliation of videotaped evidence. Carrie Johnson, No Charges In Destruction Of CIA Interrogation Tapes, *npr.org*, Nov. 9, 2010, at http://www.npr.org/templates/story-/story.php?storyId=131184938. Contrast this with the high-profile cases of Roger Clemens and Martha Stewart, famously prosecuted for (allegedly) lying to federal investigators, See Allen Barra, The U.S. v. Roger Clemens, *Wall St. J.com*, Aug. 28, 2010, at http://online.wsj.com/article/SB10001424052748703447004575449761648103160.html; Brooke A. Masters, Martha Stewart Sentenced to Prison, *Wash. Post*, Jul. 17, 2004, at A-1. Government is the omnipresent teacher, and the lesson is clear: The subjects of our police-state[8] lie to the government at their

---

[8]"What's key to the definition of a police-state is the lack of redress: If there is no justice system which can compel the state to cede to the citizenry, then there is a police-state." Gonzalo Lira, Is the U.S. a Fascist Police-State?, *Zero Hedge* (blog), Jun. 25, 2010 (emphasis added). The author, who lived

own peril, but government employment is a "get out of jail free" card.

The extent to which our federal government has facilitated official lawlessness was again brought to the fore by State Department cables published by Wikileaks. Evidently, when American officials commit war crimes abroad, our diplomats consistently pressure allies to quash criminal indictments with all the *subtlety* of Tony Soprano. For example, in the el-Masri incident, Deputy Chief of Mission John Koenig urged German authorities to quash indictments against CIA operatives, reminding

> [German Deputy National Security Adviser Rolf] Nikel of the repercussions to U.S.-Italian bilateral relations in the wake of a similar move by Italian authorities last year.
>
> The DCM pointed out that our intention was not to threaten Germany, but rather to urge that the German Government weigh carefully at every step of the way the implications for relations with the U.S.[9]

---

in Chile under Pinochet, is in a position to know.

[9]JR Timken, Al-Masri Case -- Chancellery Aware of USG Concerns, Memo (to Secretary of State Condoleeza Rice), Feb. 7, 2007, reprinted at http://www.wikileaks.is/cable/2007/02/07-BERLIN242.html.

The only things missing are the rancid mozzarella -- and *Paulie Walnuts*.

Our government's nefarious efforts to insulate public officials from prosecution for war crimes were bipartisan, and even involved members of Congress. In Spain, the role of Paulie Walnuts was played by retired Sen. Mel Martinez (R-FL), who, along with the memo's author, "met Acting [Foreign Minister] Angel Lossada during a visit to the Spanish [Ministry of Foreign Affairs] on April 15. Martinez and the Charge [d'Affairs] underscored that the prosecutions would not be understood or accepted in the U.S. and would have an enormous impact on the bilateral relationship."[10] Although crusading Judge Balatasar Garzón pressed on, the Spanish government brought pressure to bear, eventually removing the case from his court.[11]

---

[10] Arnold A. Chacon, Spain, Attorney General Recommends Court Not Pursue GTMO Criminal Case vs. Former USG Officials, Memo (to Secretary of State Hillary Clinton, et al.), Apr. 17, 2009, reprinted at http://www.wikileaks.is/cable-/2009/04/09MADRID392.html.

[11] Judge Garzón was indicted shortly thereafter for "abuse of powers" for investigating the Franco regime. Charges Against Spanish Investigative Judge Must be Dropped, Amnesty Int'l., Apr. 21, 2010. *See generally*, David Corn, Obama and GOPers Worked Together to Kill Bush Torture Probe, *MotherJones*, Dec. 1, 2010, http://motherjones.com/politics/2010/12/wiki-leaks-cable-obama-quashed-torture-investigation.

The issues before this Court also have broader implications in domestic courts. As Chief Justice Marshall famously observed, judges "have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution." *Cohens v. Virginia*, 19 U.S. 264, 404 (1821). While that may not have been a crime, in many cases, the willful refusal of a judge to exercise jurisdiction is a federal crime. *E.g.*, 18 U.S.C. § 242 (violation of federal rights). If federal judges can be subjected to meaningful punishment for the willful refusal to do their jobs, they will be more diligent in performance of their duties, thereby benefiting all Americans.

In England, the writs of mandamus and *scire facias* and the right to privately prosecute crimes committed against you were powerful antidotes to the tyranny of the magistracy, as the official who chose to abuse his office could expect to lose his sinecure. *E.g.*, *Rex v. Toly* [1794] 73 ER 436 (K.B.) (surveyor).

The conceptual legal question before this Court is whether the Framers intended to preserve these time-honored rights of Englishmen, in perpetuity, as against the federal government. If so, these rights cannot lawfully be legislated or interpreted away, or expire through desuetude.

II. THE FRAMERS INTENDED THAT CITIZENS BE EMPOWERED TO ENFORCE ARTICLE III GOOD BEHAVIOR TENURE.

> *The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour...*[12]

While the Framers intended that federal judges be granted lifetime sinecures, that grant was plainly subject to the maintenance of "good behavior." As it "cannot be presumed that any clause in the Constitution is intended to be without effect," *Marbury v. Madison*, 5 U.S. 137, 174 (1803), this Court must give meaning to that phrase, unless it is impossible to do so. And as the Constitution did not define that phrase of legal art, familiar to anyone who has studied for the Bar, it logically follows that the Framers did not believe it necessary for them to do so.

In the course of debate at the Virginia Ratification Convention, James Madison explained to his colleagues that whenever "a technical word is used [in the Constitution], all the incidents belonging to it necessarily attended it." 3 Elliot, *Debates on the Federal Constitution* 531 (1836). This understanding was further assumed by Judge Pendleton, John Marshall, and Edmund Randolph in subsequent

---

[12] U.S. Const. art. III, § 1 (italicized for style purposes).

debate. Id. at 546, 558-59, 573. More importantly, this Court adopted this line of reasoning in *United States v. Wilson*, 32 U.S. 150 (1833), where the very same John Marshall found that the scope of the President's pardon power was determined by reference to English law:

> The Constitution gives to the President, in general terms, "the power to grant reprieves and pardons for offenses against the United States." As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, **we adopt their principles** respecting the operation and effect of a pardon, **and look into their books for the rules prescribing the manner in which it is to be used** by the person who would avail himself of it.

Id. at 160 (emphasis added).

Good behavior tenure, and use of the writ of scire facias to enforce it, is almost as old as Magna Carta. The writ itself can be traced to the early fourteenth century; it was used to punish abuses of office since the reign of Edward VI. 2&3 Edw. 6, c. 8, §13 (ca. 1540). A quarter-millenium may not be time immemorial, but it is the next closest thing.

A. The History Of Good Behavior Tenure In England

Although most agents of the Crown served "at the pleasure of the King," public officials in England were frequently given a freehold in their offices, conditioned on "good behavior." *See e.g.*, 4 E. Coke, Institutes of the Laws of England 117 (1644) (Baron of the Exchequer). Lesser lords were also granted authority to bestow freeholds, creating an effective multi-tiered political patronage system, wherein everyone from paymasters to parish clerks enjoyed job security. *See e.g.*, *Harcourt* v. *Fox* [1692] 1 Show. 426 (K.B.) (clerk of the peace).

At common law, an official's good behavior tenure was originally enforced by the sovereign through the writ of *scire facias*. But as this power concerned only the interests of his subjects, and the King exercised it only *in parens patriae*, he was bound by law to allow the use of it to any subject interested. Blackstone explains:

> WHERE the crown hath unadvisedly granted any thing by letters patent, which ought not to be granted, or where the patentee hath done an act that amounts to a forfeiture of the grant, the remedy to repeal the patent is by writ of *scire facias* in chancery. This may be brought either on the part of the king, in order to resume the thing granted; or, if the

> grant be injurious to a subject, the king is bound of right to permit him (upon his petition) to use his royal name for repealing the patent in a scire facias.

3 Wm. Blackstone, Commentaries on the Laws of England 260-61 (1765); *see, United States v. American Bell Tel. Co.*, 28 U.S. 315, 360 (1888) (explaining the process).

By making a public official subject to removal for violating it, the condition of good behavior defined the powers of a given office. Lord Coke listed three grounds for forfeiture of good behavior tenure: abuse of office, nonuse of office, and willful refusal to exercise an office. Prakash and Smith, *How to Remove a Federal Judge*, 116 Yale L.J. at 90 (citing Coke's *Institutes*). Blackstone adds, "oppression and tyrannical partiality of judges, justices, and other magistrates, in the administration and under the colour of their office," was an alternative ground for removal. 4 Blackstone, *Commentaries* at 140-41. As such, a duty to be fair and impartial was an integral part of an 18th-century English judge's job description, as was the duty to hear every case properly brought before his court.

More importantly, the "abuse of office" condition curtails a judge's freedom of action. The Framers envisioned judges as mere interpreters of the law, as opposed to Platonic Guardians. Alexander Hamilton

explained that, to "avoid an arbitrary discretion in the courts, it is indispensable that [judges] should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case before them." The Federalist No. 78, 470 (Alexander Hamilton) (I. Kramnick ed. 1987). Blackstone, whose works "constituted the preeminent authority on English law for the founding generation," *Alden v. Maine*, 527 U. S. 706, 715 (1999), observed that the judge's duty to follow precedent derived from the nature of the judicial power itself: the judge is "sworn to determine, not according to his own judgments, but according to the known laws." 1 Blackstone, *Commentaries* at 69. A century earlier, Coke wrote, "[i]t is the function of a judge not to make, but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion." 1 Coke, *Institutes* at 51. Jefferson captures the concept with his inimitable brilliance: "Let the judge be a mere machine." Thomas Jefferson, Letter (to Edmund Pendleton), Aug. 26, 1776.

The writ of *scire facias* was not used as a mechanism for removing judges in England for practical reasons: prior to the Glorious Revolution of 1688, English judges had been "lions under the throne," servile creatures of the King. Moreover, at common law, the jury was the ultimate arbiter of both law and fact, *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794), judges were learned advisors and administrators,

who were rarely in a position to issue binding edicts. Additionally, when a judge caused harm from abuse of his authority, he was liable for damages in tort. See generally, Jay M. Feinman and Roy S. Cohen, *Suing Judges: History and Theory*, 31 S.Car. L. Rev. 201 (1980). As near as can be determined, the question had not been litigated in an English court prior to 1789.[13]

That having been said, its existence as a remedy was widely presumed. The Act of Settlement [1701], 12 & 13 Will. 3, c. 2, §3, provided that "Judges Commissions be made *Quamdiu se bene gesserint*; ... but on the Address of both Houses of Parliament, it may be lawful to remove them." According to America's then-leading scholar on impeachment, Harvard's Raoul Berger, "the decided preponderance of authority, Lord Chancellor Erskine, Holdsworth, and others, consider that this provision did not exclude other means of [judicial] removal, that is, by impeachment, scire facias, or criminal conviction." Raoul Berger, *Impeachment: The Constitutional Problems* 157 (Harvard U. Pr. 1974) (footnote omitted).

---

[13] Berger, *Impeachment* at 133 and n. 40. Ironically, English judges insisted that judges ought to be removed through the *scire facias*, as it provided more procedural protections than removal via parliamentary address. Id. at 134-35 (collecting instances).

B. Textual Analysis Proves That the Framers Intended That the Writ Of *Scire Facias* Could Be Used By An Aggrieved Citizen To Remove a Federal Judge From Office.

Drawing upon the experience of Britain and the counsel of Montesquieu, (in *The Spirit of Laws*, bk. XI, ch. 6 at 173-86 (J. Alembert ed. 1873) (T. Nugent trans.) (1748)), the Framers sought to create a truly tripartite government, ensuring that the judiciary would be independent of undue influence by either the legislative or executive branches. To this end, they refused to entrust Congress with the power of address, as it would render the judiciary subservient to the legislature. Conversely, as the judiciary must be accountable in order to remove the threat of judicial despotism, they had to impose some constraints upon judicial autonomy.

In crafting the Constitution, the Framers invested the power to impeach in the House of Representatives, U.S. Const. art. I, § 2, cl. 5, enumerated the grounds for impeachment in Article II, and imposed the condition of good behavior upon federal judges in Article III. As Professor Berger explains, this is inimical to the claim that impeachment is the sole basis for removing a federal judge from office:

> The argument for exclusivity of the Act of Settlement is in pertinent detail much stronger than can be made under our Consti-

> tution. In that Act, the "good behavior" and removal provisions were spatially and temporally separated. "Good behavior" appeared at the outset, while the separate provision for impeachment must be located in the belated insertion of "civil Officers" in Article II. No indication is found in any way associated with the earlier provision for "good behavior" tenure.

Berger, *Impeachment* at 158.

Still, the weightiest argument against the equation of impeachable offenses with violations of good behavior tenure is that *Congress* believes that they were not one and the same. This was established a century ago in the investigation of Judge Emory Speer of the District of Georgia, who was charged with "despotism, tyranny, oppression, and maladministration" in the course of his judicial decision-making. Charles Geyh, *When Courts and Congress Collide: The Struggle for Control of America's Courts* 160 (U. Mich. Press 2008). Specifically, the congressional committee concluded that "a series of legal oppressions [constituting] an abuse of judicial discretion" did not constitute an impeachable offense, id. at 160-61 (quotations omitted), despite their being self-evident serial violations of his good behavior tenure. Cf., 4 Blackstone, *Commentaries* at 140-41 ("oppression and tyrannical partiality of judges, justices, and other magistrates, in the

administration and under the colour of their office" violated their good behavior tenure).

Justice Frankfurter counsels that we should read the law "with the saving grace of common sense." *Bell v. United States*, 349 U.S. 81, 83 (1955). That the Constitution did not specify a procedural mechanism by which good behavior tenure is enforced is of no moment; as a procedure existed at common law (the writ of scire facias, wielded by an aggrieved litigant, in the name of the government), there was no need to invent one. "We must never forget that it is *a Constitution* we are expounding." *McCullough v. Maryland*, 17 U.S. 316, 407 (1819). A constitutional provision "should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation and suppress the mischief at which it was aimed." *Jarrolt v. Moberly*, 103 U.S. 580, 586 (1880). Here, the mischief is judicial despotism; the remedy as contemplated at common law is removal from the bench.

Nor can this Court interpret the "good behavior" clause into oblivion, as "[i]t cannot be presumed that any clause in the Constitution is intended to be without effect, and therefore such construction is inadmissible unless the words require it." *Marbury v. Madison*, 5 U.S. at 174. "No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized,'" The Federalist No. 44 at 290 (Madison), and "[t]o give

meaning to a tenure limited to 'good behavior' there must be a means for termination for misbehavior." Berger, *Impeachment* at 138.

C. The Decision Below Is a Pristine Example Of Judicial Lawmaking.

Judge Richard Posner is a national treasure, if for nothing else but his candor. He concedes that there is "a pronounced political element in the decisions of American judges," and that the evidence of this is "overwhelming." Richard A. Posner, *How Judges Think* 369 (Harvard U. Pr. 2008). "Appellate judges in our system can often conceal the role of personal preferences in their decisions by stating the facts selectively, so that the outcome seems to follow from them inevitably, or by taking liberties with precedents." Id. at 144. The typical result is an unreasoned decision, usually "difficult or impossible to accept as an act reflecting systematic application of legal principles." *Wisconsin v. Allen*, No. 2010-WI-10 (Wis. 2010) (slip op. at ¶ 79). Judges "are constantly digging for quotations from and citations to previous cases to create a sense of inevitability about positions that they are in fact adopting on grounds other than deference to precedent" -- a process colorfully characterized as "fig-leafing." Posner, *How Judges Think* at 350.

Posner was refreshingly blunt in his scorched-earth assessment of judicial behavior. He admits that judges are liars, "parrot[ing] an official line about the judicial process (how rule-bound it is) ... though it does not describe their actual practice." Id. at 2. Judges "are not moral or intellectual giants," id. at 3, but are all too human. And they do what humans do: act in their own self-interest. This Court is, of course, free to take issue with the man Justice Kagan praises as the "the most important legal thinker of our time," Elena Kagan, *Richard Posner, the Judge*, 120 Harv. L. Rev. 1121, 1121 (2007), but it is painfully apparent that the Panel below has indulged in an orgy of unconstitutional judicial lawmaking:

> Although the Constitution itself does not expressly limit removal of Article III judges to Congressional impeachment, the Supreme Court has taken that view. *See N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982) (explaining that "[t]he 'good Behaviour' Clause guarantees that Art. III judges shall enjoy life tenure, subject only to removal by impeachment") (plurality opinion); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955) (stating that "[Article III] courts are presided over by judges appointed for life, subject only to removal by impeachment").

Smith v. Krieger, No. 09-1503 (10th Cir. Jul. 27, 2010) (combined with *United States ex rel. Smith v. Anderson*, No. 10-1012)(unpublished; slip. op. at 18).

This Court has never addressed application of the Good Behavior Clause to aggrieved citizens -- a point respected academicians have recently made. *Prakash and Smith, supra.* If anything, all the *Toth* Court said was that Article III was "designed to give judges maximum freedom from possible coercion or influence" by other branches of government. *United States ex rel. Toth*, 350 U.S. at 16 (1955). *Northern Pipeline* is a plurality opinion, parroting irrelevant pronouncements made in *Toth.* In short, the court below completely elided the issue before it, failing to address the obvious: If Article III judges can only be removed from office via impeachment, and one can only be impeached for acts of "Treason, Bribery, or other high Crimes and Misdemeanors," U.S. Const. art. II, § 4, why does the Good Behavior Clause even exist?

III. THE VICTIM'S RIGHT TO PROSECUTE CRIMES COMMITTED AGAINST HIM WAS "RETAINED BY THE PEOPLE."

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Dist. of Columbia v. Heller*, 554 U.S. ___, ___ (2008) (slip op., at 63). If the Framers understood that the citizen was entitled to prosecute crimes committed against him, and they incorporated this understanding into the Constitution and Bill of Rights (either directly, or via implication), it is binding upon this Court.

Since time immemorial, the English subject has always had legal authority to prosecute crimes committed against him. *See e.g.*, 3 Blackstone, *Commentaries* at 139 (crime of abduction: the taking of a man's wife). Logically, this must be so, in order to ensure that where there is a legal right, there is also a "legal remedy by suit or action at law whenever that right is invaded." *Id.* at 23. To hold otherwise would effectively void the law in its entirety, as the citizen would be deprived of the ability "to claim the protection of the laws whenever he receives an injury." *Marbury v. Madison*, 5 U.S. at 163.

A. The Bill of Rights "Constitutionalized" Common Law Remedies Against Abuse of Official Authority.

The Constitution and Bill of Rights must be read *in pari materia*, for without the latter, the former would not exist. Many Colonies conditioned ratification of the Constitution on the passage of an adequate bill of rights; the North Carolina Ratification Convention declined to ratify by nearly a 70/30 margin without it. 3 Elliot, Debates at 250-51.

Unlike its provincial counterparts, the federal Bill of Rights did not affirmatively declare a single right. Rather, it was a charter of negative liberties, intended to restrain the government. See, Bill of Rights, Preamble (U.S. 1791). As James Madison observed while introducing it in Congress,

> I believe that the great mass of the people who opposed [the proposed Constitution], disliked it because it did not contain effectual provisions against encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercised the sovereign power: nor ought we to consider them safe, while a great number of our fellow citizens think these securities necessary.

1 Annals of Congress 450 (Jun. 7, 1789) (statement of Rep. Madison).

England wasn't your classic monarchy, where the king ruled by divine right and his subjects were mere thralls. Quite to the contrary, the real weight of sovereignty lay in Parliament; the King was not so much a person but an office, held in trust for the public benefit. Magna Carta ¶ 61 (1215). The English Bill of Rights ([1688] c.2 1 W. & M. Sess. 2) was a mere statute -- subject to revision or abolition by a mere vote of Parliament and therefore, insecure.

The Framers had been subjects of the Crown, accustomed to enjoying the "rights of Englishmen." The primary motivation behind the Revolution was that in the Colonies, essential rights and protections against abuses of magisterial power were routinely abridged. Having learned this lesson at first hand, many States enacted elaborate declarations of rights and liberties, elevating common law rights to the status of paramount law. The federal Bill of Rights was intended to achieve that same goal with respect to infringements by the national government.

B. The Ninth and Tenth Amendments Preserved Unenumerated Rights and Remedies.

Inclusio unius est exclusio alterius. The problem with any attempt to fashion a comprehensive list of

the rights of Man is that you are invariably going to forget a few, and by failing to list them, you run the risk of ceding them to the government. As James Madison explained to Congress, "by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure." 1 Annals at 456 (Madison). Accordingly, his first draft of our Ninth Amendment read as follows:

> The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

Id. at 452.

This evolved into our modern Ninth and Tenth Amendments; taken together, they introduced "popular sovereignty" into the Constitution. The Ninth is a constitutionally mandated imperative rule of judicial construction, prohibiting Article III judges from interpreting the Constitution in a manner that would "deny or disparage [unenumerated rights]

retained by the people," U.S. Const, amend. IX; the Tenth is an express reservation of powers to "the States respectively, or to the people." Id. amend. X. Accordingly, the government can only infringe upon rights retained by the people when it must do so to discharge its duties. Professor Randy Barnett refers to this as "the presumption of liberty." Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004).

C. The Historical Evidence Unequivocally Supports the Proposition That the Right to Conduct Private Prosecutions Was Retained By the People.

If a right is reserved to the people by virtue of the Bill of Rights, only a countervailing constitutional provision can divest the people of it. *See Reid v. Covert*, 354 U.S. 1 (1957) (the Constitution alone is the paramount 'law of the land'). Private prosecution may well have fallen into desuetude, but it cannot simply be read out of the Constitution, as the courts below maintain.

First, it can be said with confidence that as of 1789, no jurisdiction creating an office of attorney general had vested an exclusive right to prosecute in that office, despite language in their state charters substantially identical to that of the Constitution. Second, there is no "clear indication" in the Consti-

tution that the Framers had intended to abolish all common-law remedies for official misconduct. Given the general rule that all common law remedies of long pedigree were intended to be constitutionalized in the Bill of Rights, for this power to be delegated to government, there has to be a mechanism by which it was in fact delegated. Careful review of the Constitution and its state counterparts reveals no evidence of such delegation.

In the eighteenth century, crime was generally viewed as a private injury; there was no distinction between civil and criminal proceedings. Morris Ploscowe, *The Development of Present-Day Criminal Procedures in Europe and America*, 48 Harv. L. Rev. 433, 437 (1935). A "prosecutor" was anyone coming before a grand jury with a complaint, *e.g. United States v. Sandford*, F.Cas. No. 16,221 (C.Ct.D.C. 1806), and throughout the colonies, the attorney general was simply lawyer for the Crown. The office of attorney-general, created in many state constitutions, e.g., Pa. Const. of 1776, § 20 (1820); N.J. Const. of 1776, art. XII (1844), co-existed with the practice of private prosecution in every state, both before and after the Revolution.

It can further be said with confidence that there is no historical warrant for the proposition that the constitutional charge to the President that "he shall take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, invests the Executive with

that exclusive authority. Both the New York, N.Y. Const. of 1777 art. XIX (1777), and Pennsylvania constitutions, Pa. Const. of 1776, § 20 (1820), enacted a decade before their federal counterparts, had virtually identical clauses. They were certainly not interpreted as outlawing private prosecution; in Philadelphia, it evolved into a sort of 'blood sport.' *See generally*, Allen Steinberg, *"The Spirit of Litigation:" Private Prosecution and Criminal Justice in Nineteenth Century Philadelphia*, 20 J. Social Hist. 231 (1986).

Moreover, it cannot be credibly maintained that vestment of the executive power in the President, U.S. Const. art. II, § 1, grants the Attorney General an exclusive power to initiate criminal prosecutions. Virtually every state constitution of the day vested supreme executive power in a governor, *e.g.*, N.Y. Const. of 1777 art. XVII (1821), and/or governing council, *e.g.*, Pa. Const. of 1776, § 3 (1790), and private prosecution in those jurisdictions was ubiquitous.

If the Framers intended to deprive citizens of the common law right to initiate criminal prosecutions, one is left to search in vain for any credible evidence of that intent. Indeed, the only suggestions that the Attorney General enjoys an exclusive franchise are off-handed comments in concurrences and dissents. *See, Bodell v. Walbrook Ins. Co.*, 119 F.3d 1411, 1997.C09.1306 ¶ 63 (9th Cir. 1997) (Kozinski, J.,

dissenting); *United States v. Cox*, 342 F.2d 167, 190 (5th Cir. 1965) (Wisdom, J., concurring) (en banc). Judge Wisdom's view was taken out of context by Judge Kozinski and is considerably more nuanced, as it is a precursor to the Supreme Court's holding that Congress' role in the prosecution of crimes is quite limited. *Morrison v. Olson*, 487 U.S. 654, 692-96 (1988).

D. Does the Outcome Below Make Any Sense?

The most compelling argument against the exclusivity of the United States Attorney's franchise with respect to criminal prosecution is that no reasonably informed citizen would knowingly consent to it.

At the appellate level, Relator recounted the tale of James Stanley, a master sergeant stationed at Fort Knox, secretly administered doses of LSD pursuant to an Army scheme to study its effects upon humans. *United States v. Stanley*, 483 U.S. 669, 671 (1987). A second instance, acknowledged only recently, involved government medical researchers intentionally infecting hundreds of Guatemalan prisoners and mental patients, with gonorrhea and syphilis. Robert Bazell, U.S. Apologizes For Guatemala STD Experiments, NBC.com, Oct. 1, 2010, at http://www.msnbc.msn.com/id/39456324/ns/health-sexual_health/. Despite the fact that these were "crimes against humanity," for which Nazi doctors

were executed, *United States v. Brandt* (The Medical Case), 2 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, esp., pp. 298-300 (1949), available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-II.pdf, the perpetrators found shelter from the law. In an odious decision arguably branding him as a war criminal no less culpable than the Nazis, Justice Scalia found that the federal government could not be held liable in tort for its actions.

The ultimate irony is that James Stanley was a soldier, who swore to fight and die to defend a document that proved so feeble, it could not even protect him from crimes against humanity committed by his own countrymen. In turn, this begs the dispositive question in this case:

> Would any sane human being, armed with knowledge that the Constitution cloaked the proposed federal government and its senior officials in a impermeable shield of criminal and tort immunity, so that their 'betters' in Philadelphia could arbitrarily deprive them of their "God-given rights" at any time with absolute impunity, have willingly consented to that arrangement?

Were Stanley a sergeant in Her Majesty's Armed Forces, he would have had a healthy array of remedies at his disposal. If officials refused to prosecute

his superiors for crimes against humanity, he would have the right to do it himself. *See e.g.*, Barrymore Facing Pool Death Case, *BBC News*, Jan. 16, 2006 (Great Britain).

This is a right available in some way, shape, or form throughout the *civilised* world. A brief survey of established Western democracies reveals that in most instances, prosecutors have little discretion as to whether to prosecute a crime. Italy includes an express duty to prosecute in its constitution. *Costituzione della Repubblica Italiana* [Constitution] art. 112 (Italy 1947). Spain empowers her citizens to initiate criminal proceedings. *Constitución Espanola de 1978* [1978 Constitution]. Prosecutorial discretion is usually governed by statute and often, quite limited. See, Hans-Heinrich Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany*, 18 Amer. J. Comp. L. 508 (1970).

Moreover, as a subject of the Queen and citizen of the European Union, Sergeant Stanley would be entitled to the formidable protections of the International Covenant on Civil and Political Rights ("ICCPR"), 999 U.N.T.S. 171 (entered into force March 23, 1976) (ratified by the United States Sept. 8, 1992). Article 2 of the ICCPR abolished sovereign immunity, in requiring that a signatory State must provide an "effective remedy" for rights violations committed by persons acting in an official capacity. ICCPR, art. 2. Furthermore, their courts have not

blithely interpreted the ICCPR out of existence. *See Maharaj v. Attorney-General of Trinidad & Tobago (No. 2)*, A.C. 385 (1979) (rule throughout the Commonwealth); Case C-224/01, *Köbler v Austrian Republic*, 3 CMLR 28 (2003) (European Union). As such, Stanley could expect to obtain redress.

Now, consider Stanley's fate under American law as it now stands. He can forget about the protection of the ICCPR, as our courts have reduced it to a cynical exercise in diplomatic masturbation.[14] Both the perpetrators and the government are sheltered by an impenetrable wall of immunity. *Kawananakoa v. Polyblank*, 205 U.S. 349 (1907) (federal government); *Hans v. Louisiana*, supra. (states); *Pierson v.*

---

[14] If precedent carried significant weight in American courts, the ICCPR would be enforceable. The Constitution provides that valid treaties are the law of the land, U.S. Const. art. VI, cl. 2; *Head Money Cases*, 112 U.S. 580, 598-99 (1884), and "an act of congress ought never be construed to violate the law of nations, if any other possible construction remains." *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (quotation omitted). Congress expressed its intent that provisions of the ICCPR "will become binding international obligations of the United States," 138 Cong. Rec. S4,783 (1992) (statement of Sen. Moynihan (D-MA)); the State Department has warranted that whenever conforming legislation is required to comply with treaty obligations, it is our consistent practice to withhold an instrument of ratification until appropriate legislation is enacted. United States Dept. of State, Core Doc. Forming Part of the Reports of States Parties, United Nations Doc. No. HRI/CORE/USA/2005 (Jan. 16, 2005) at ¶ 157.

Ray, 386 U.S. 547 (1967) (state judges).

In considering ratification of the ICCPR, the Committee on Foreign Relations asserted that it wanted to defeat the legitimate charge that America is an international hypocrite. Sen. Comm. on Foreign Relations, Rept. on the Int'l. Covenant on Civil and Political Rights, S. Exec. Rep. No. 23, 3 (102d Sess. 1992) ("In view of the leading role that the United States plays in the international struggle for human rights, the absence of U.S. ratification of the covenant is conspicuous and, in the view of many, hypocritical"). *Irony, on steroids.* This is what happens when federal judges appoint themselves as our Platonic Guardians.

CONCLUSION

In a sense, the appellate court was half-right: All of these cases are the result of Relator's principled refusal to submit to a "mental fitness" examination. Exhibit 1 at 60. **What it *conveniently* neglected to disclose was *why*.**

Relator took a principled position, buttressed by reams of "binding" case law, that the state bar could not require him to pay for the examination out of his own pocket without violating the Americans With Disabilities Act (ADA). Title II of the ADA prohibits "discrimination" by a "public entity" against a "qual-

ified individual with a disability," 42 U.S.C. § 12132 (1999), including those who are not in fact disabled, but are "treated by a covered [public] entity as having a substantially limiting impairment." *Richards v. City of Topeka*, 173 F.3d 1247 (10th Cir. 1999). As imposing even a *de minimis* surcharge upon covered persons constitutes discrimination proscribed under the ADA, *see Dare v. California*, 191 F.3d 1167, 1171 (9th Cir. 1999) ($6 charge for handicapped placard is impermissible discrimination; collecting cases), their demand was unlawful on its face. The suit for civil damages had a solid foundation in law, *see Diblasio v. Novello*, 344 F.3d 292 (2nd Cir. 2003) (plaintiff prevailed on substantially identical facts), but when your judge can arbitrarily deny access to the courts as a favor to his personal friends and colleagues with absolute impunity, the entire United States Reports cannot avail you.

Legend claims that at the close of the Constitutional Convention in Philadelphia on September 18, 1787, a Mrs. Powel stood outside the door, anxiously awaiting the results. When Benjamin Franklin emerged, she asked him directly: "Well Doctor, what have we got, a republic or a monarchy?" "A republic, if you can keep it," responded Franklin.

The Framers gave us the tools to keep it, including the ability to prosecute public officials who committed crimes against us, and to remove judges from the bench for cause. These procedural tools would

be more than adequate to preserve our Republic, were they available in fact. But if these tools can be eviscerated by the mere stroke of a judge's pen, the Republic is utterly lost.

For these compelling reasons, this Court should grant a writ of certiorari to resolve the issues of broad significance raised by this petition.

Respectfully submitted,

__/s/_____

Kenneth L. Smith, as Relator
23636 Genesee Village Rd.
Golden, Colorado 80401
Tel: (303) 526-5451

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 8,975 words, excluding those parts of the document exempted by Supreme Court Rule 33.1(d), and that the text is set in the Century family (New Century Schoolbook).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____, 2010.

_/s/_____
Kenneth L. Smith, in propria persona

EXHIBITS

Exhibit 1

---

[1] UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[2] Nos. 09-1503 & 10-1012

[3] 2010.C10.0000887< http://www.versuslaw.com>

[4] July 27, 2010

[5] KENNETH L. SMITH, PLAINTIFF-APPELLANT,
v.
HON. MARCIA S. KRIEGER, IN HER OFFICIAL CAPACITY AS JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO; THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO; THE TENTH CIRCUIT COURT OF APPEALS; THE COLORADO COURT OF APPEALS; THE SUPREME COURT OF COLORADO; JOHN DOES 1-99, DEFENDANTS-APPELLEES.

KENNETH L. SMITH, PLAINTIFF-APPELLANT, [SIC]
v.
STEPHEN H. ANDERSON; ROBERT R. BALDOCK; ROBERT E. BLACKBURN; MARY

BECK BRISCOE; ROBERT H. HENRY; PAUL J. KELLY, JR.; MARCIA S. KRIEGER; MICHAEL W. MCCONNELL; STEPHANIE K. SEYMOUR; DEANELL REECE TACHA; JOHN DOES 1-20; WILEY Y. DANIEL; JUDGE DOE 21, IN THEIR REPRESENTATIVE CAPACITIES; UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, DEFENDANTS-APPELLEES.

[6] (D.C. Nos. 1:08-CV-00251-CMA-KMT & 1:09-CV-01018-PAB) (D. Colo.).

[7] The opinion of the court was delivered by: Jerome A. Holmes Circuit Judge

[8] ORDER AND JUDGMENT*fn1

[9] Before HOLMES and PORFILIO, Circuit Judges, and BRORBY, Senior Circuit Judge.

[10] These appeals are the latest in a series of cases and appeals filed pro se by Kenneth L. Smith, all of which can be traced to the Colorado Supreme Court's denial of his application for admission to the Colorado bar after he refused to submit to a mental status examination. See Smith v. Mullarkey, 67 F. App'x 535, 536 (10th Cir. 2003) (Mullarkey I) (explaining denial of Mr. Smith's application); Smith v. Mullarkey, 121 P.3d 890, 891 (Colo. 2005) (Mullarkey II) (same). In No. 09-1503, Smith v. Krieger, the district court granted the defendants'

motions to dismiss and denied Mr. Smith's post-judgment motion to alter or amend the judgment. In No. 10-1012, Smith v. Anderson, the district court granted the defendants' motions to dismiss, denied Mr. Smith's post-judgment motion, and imposed filing restrictions.

[11] This court, on its own motion, has consolidated these appeals for submission and disposition. Because Mr. Smith proceeded pro se in the district court and on appeal, we give his filings a liberal construction, but we do not act as his advocate, and his pro se status does not relieve him of complying with procedural rules applicable to all litigants. See Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 840 (10th Cir. 2005). In Krieger, we conclude that we have jurisdiction over only the denial of his post-judgment motion, which we affirm, deeming that appeal frivolous. In Anderson, we conclude that we have jurisdiction over the district court's dismissal of his action and its order imposing filing restrictions, both of which we affirm. Further, based on Mr. Smith's abusive pattern of litigation, we impose a monetary sanction of $3,000 and appellate filing restrictions.

[12] I. 09-1503, Smith v. Krieger

[13] A. Background

[14] In Smith v. Krieger, Mr. Smith filed a

complaint in the United States District Court for the District of Colorado. He initially named the Honorable David M. Ebel as a defendant in his official capacity, apparently with an eye to policing Judge Ebel's handling of another case Mr. Smith had filed in that district, Smith v. Bender, No. 1:07-cv-01924-MSK-KMT (filed Sept. 12, 2007). See Aplt. Opening Br. at 17 ("this lawsuit was filed with the purpose of attempting to prevent what happened in [Bender]"). Mr. Smith also named the district court and this court (the Federal Defendants), the Colorado Court of Appeals and the Colorado Supreme Court (the State Defendants), and 99 John Does as defendants. The case was drawn to Judge Ebel, who recused himself, and reassigned to the Honorable Marcia S. Krieger. After Judge Ebel recused himself in Bender, that case was assigned to Judge Krieger. Mr. Smith then filed an amended complaint in this case, substituting Judge Krieger in her official capacity for Judge Ebel.

[15] Mr. Smith's amended complaint was based on allegations that "[d]efendants' practices of issuing 'designer law' (opinions applicable to one and only one set of defendants), issuing so-called 'unpublished' opinions (opinions declared to be devoid of precedential effect), and issuing opinions that fabricate and/or elide key facts" exceeded judicial power as defined in Article III of the Constitution and deprived him and similarly situated citizens of their right of access to the courts

and to due process under the First, Fifth, and Fourteenth Amendments. R., Vol. 1 at 488-89, ¶¶ 104, 108. He also alleged that defendants violated his right to equal protection by treating "all pro se cases . . . shabbily and superficially." Id. at 488, ¶ 106 (internal quotation marks omitted). He requested a declaration that defendants violated these rights as alleged, and preliminary and permanent injunctions prohibiting them from issuing orders or decisions (1) without addressing all legal arguments or factual contentions in a manner sufficient to facilitate adequate appellate (and, in this court, en banc) review; (2) without providing a rationale for any deviation from controlling precedent "sufficient to ensure that an appellate court and the general public will be aware of the variance"; and (3) "designated as being without precedential effect." Id. at 490-91.

[16] After being named as a defendant in this case, Judge Krieger recused herself and filed a motion to dismiss. The Federal Defendants and the State Defendants also filed motions to dismiss. A magistrate judge issued a recommendation that defendants' motions be granted for a variety of reasons and that Mr. Smith's motion for injunctive and declaratory relief be denied.

[17] Mr. Smith filed objections. The district court modified the recommendation and adopted it, granting defendants' motions, denying Mr. Smith's

motion, and dismissing the case in its entirety. With respect to Judge Krieger and the Federal Defendants, the district court determined that they were protected by sovereign immunity, a "concept [that] has long been firmly established by the Supreme Court, see, e.g., Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821)," Smith v. Krieger, 643 F. Supp. 2d 1274, 1280 (D. Colo. 2009). The court also concluded Mr. Smith had failed to show a waiver of the Federal Defendants' or Judge Krieger's sovereign immunity. The court further explained that to the extent Mr. Smith's complaint could be read as requesting relief against those defendants under the mandamus provision of 28 U.S.C. § 1361, this court had determined in Trackwell v. United States Government, 472 F.3d 1242, 1245-46 (10th Cir. 2007), that § 1361 does not confer district-court jurisdiction over the federal courts or their judicial officers.

[18] As to the State Defendants, the court concluded it lacked power to direct them in the performance of their judicial duties, see Van Sickle v. Holloway, 791 F.2d 1431, 1436 n.5 (10th Cir. 1986), and that Mr. Smith's allegation that the Colorado Supreme Court's adverse decision in Mullarkey II was rendered without jurisdiction was no bar to the application of the Rooker-Feldman doctrine*fn2 to his present claims because "'there is no procedural due process exception to the Rooker-Feldman rule.'" Krieger, 643 F. Supp. 2d at 1283

(quoting Snider v. City of Excelsior Springs, Mo., 154 F.3d 809, 812 (8th Cir. 1998)).

[19] The district court's order was filed on August 3, 2009, and its separate judgment on August 4, 2009. On August 21, 2009, Mr. Smith filed a motion titled "Rule 59(e) Motion to Alter or Amend Judgment" (the Post-Judgment Motion), and he later moved for a hearing on the motion. The district court denied both motions on September 9, 2009, concluding that in his Post-Judgment Motion, Mr. Smith had simply reargued his case, which was not an appropriate basis for relief under Rule 59(e), and that a hearing was unnecessary.

[20] Mr. Smith filed his notice of appeal (NOA) on November 6, 2009. In its substantive entirety, the NOA read:

[21] NOTICE IS HEREBY GIVEN that Kenneth L. Smith, Plaintiff in the above-captioned case, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Final Judgment entered herein on August 4, 2009 (post-judgment motions disposed of on September 9, 2009).

[22] R., Vol. 2 at 451.

[23] B. Discussion

[24] 1. Appellate Jurisdiction

[25] Although none of the appellees have expressed concern about the effect that the timing of Mr. Smith's Post-Judgment Motion or the substance of his NOA has on our jurisdiction over this appeal, we have an obligation to analyze our jurisdiction sua sponte. See Amazon, Inc. v. Dirt Camp, Inc., 273 F.3d 1271, 1274 (10th Cir. 2001). Under Rule 4 of the Federal Rules of Appellate Procedure, "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." Bowles v. Russell, 551 U.S. 205, 214 (2007). And under Rule 3(c)(1) of those Rules, a "notice of appeal must . . . specify the party or parties taking the appeal," "designate the judgment, order, or part thereof being appealed," and "name the court to which the appeal is taken."

[26] Fed. R. App. P. 3(c)(1). "Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review. Although courts should construe Rule 3 liberally when determining whether it has been complied with, noncompliance is fatal to an appeal." Smith v. Barry, 502 U.S. 244, 248 (1992). Thus, to confer jurisdiction on this court, a document must be filed within the time specified by Rule 4 and provide the notice required by Rule 3.

[27] Although it is clear from his NOA that Mr. Smith intended to appeal to this court, the NOA is not timely with respect to the district court's

underlying judgment, and it is debatable whether he adequately designated the order denying his Post-Judgment Motion as an object of his appeal. We first address timeliness.

[28] Because Mr. Smith did not file his Post-Judgment Motion within ten days of the district court's judgment, excluding intervening weekend days and holidays, see Fed. R. Civ. P. 6(a)(2) (2009),*fn3 we treat it as a motion brought under Rule 60(b) rather than one brought under Rule 59(e). See Price v. Philpot, 420 F.3d 1158, 1167 n.9 (10th Cir. 2005). Thus construed, the motion did not toll the time for filing a notice of appeal because it was not filed within ten days of the district court's judgment. See Fed. R. App. P. 4(a)(4)(A). In order to timely appeal the underlying judgment, therefore, Mr. Smith had to file his NOA "within 60 days after the judgment or order appealed from is entered,"

[29] Fed. R. App. P. 4(a)(1)(B), the time limit applicable when the United States, its officers, or one of its agencies is a party. The district court's judgment was filed August 4, 2009, so Mr. Smith's NOA was due by October 3, 2009, but he did not file it until November 6, 2009. As such, the NOA was clearly untimely as to the district court's underlying judgment, and we lack jurisdiction to review that judgment. See Bowles, 551 U.S. at 214.

[30] With respect to the district court's September

9 order denying the Post-Judgment Motion, Mr. Smith's NOA is timely but arguably noncompliant with the requirement that it "designate the judgment, order, or part thereof being appealed." Fed. R. App. P. 3(c)(1)(B). The NOA clearly designates the underlying judgment as an object of the appeal, but makes only parenthetical reference to the date on which the district court denied the Post-Judgment Motion. Furthermore, in his opening appellate brief, Mr. Smith has not specifically addressed the district court's denial of his Post-Judgment Motion, suggesting that he did not intend to appeal it. Given Mr. Smith's pro se status, however, and the liberal construction we are to give Rule 3, Smith, 502 U.S. at 248, we will construe the NOA as sufficiently designating the order denying his Post-Judgment Motion for purposes of Rule 3(c)(1)(B) because it refers to the fact that the order was issued, and we will construe the arguments in his appellate brief as arguments that the district court should have granted post-judgment relief because it committed clear error in issuing its order of dismissal, which is a valid basis for such relief, see Servants of Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000).

[31] 2. Merits

[32] We review the district court's denial of Mr. Smith's Post-Judgment Motion for an abuse of discretion. See Jennings v. Rivers, 394 F.3d 850, 854

(10th Cir. 2005). Mr. Smith has advanced three main disagreements with the district court's underlying dismissal order: (1) that sovereign immunity lacks constitutional grounding; (2) that judicial immunity is no bar to relief in the nature of mandamus under 28 U.S.C. § 1361 against judges and courts; and (3) that the Colorado Supreme Court acted without jurisdiction in Mullarkey II, so its judgment is void, the Rooker-Feldman doctrine is inapplicable, and, apparently, the district court should have issued a declaration to that effect.

[33] First, as the district court observed, the jurisdictional implications of the United States' sovereign immunity are firmly entrenched in Supreme Court jurisprudence. See, e.g., United States v. Mitchell, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."); Cohens, 19 U.S. at 411-12 ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States[.]"). And we are not at liberty to cast aside applicable Supreme Court precedent. United States v. Harris, 447 F.3d 1300, 1303 n.1 (10th Cir. 2006). The judiciary, which necessarily includes the Federal Defendants and Judge Krieger in her official capacity, forms one branch of the United States government, see generally U.S. Const. art. III, and therefore is protected by the sovereign immunity accorded the United States. Congress

may waive the United States' sovereign immunity, but waiver must be express, United States v. Mitchell, 445 U.S. 535, 538 (1980), and the burden is on Mr. Smith to identify a specific waiver of sovereign immunity as it applies to his claims against the Federal Defendants or Judge Krieger, see Normandy Apartments, Ltd. v. U.S. Dep't of Housing and Urban Dev., 554 F.3d 1290, 1295 (10th Cir. 2009). He has failed to do so, arguing instead that sovereign immunity itself lacks a constitutional basis, a notion wholly incompatible with the long-standing Supreme Court precedent noted above.

[34] Regarding the district court's denial of relief in the nature of mandamus, a panel of this court has held that such relief does not lie against the federal courts under 28 U.S.C. § 1361, Trackwell, 492 F.3d at 1246, and another panel has held that federal courts lack mandamus power to order state courts or their judicial officers to perform their judicial duties, Van Sickle, 791 F.2d at 1436. There was no error in the district court's application of these holdings. Mr. Smith's argument that judicial immunity is no bar to relief under § 1361 is irrelevant, as the district court specifically did not base its dismissal in any respect on judicial immunity.

[35] Finally, Mr. Smith's argument that Mullarkey II was rendered in the absence of jurisdiction and is therefore void, nullifying the application of Rooker-Feldman doctrine, lacks an

arguable basis. We have already informed Mr. Smith once that "the Rooker-Feldman doctrine bars [him] from relitigating the refusal of the Justices of the Colorado Supreme Court to recuse from his appeal in . . . Mullarkey [II]." Smith v. Bender, 350 F. App'x 190, 193 (10th Cir. 2009), cert. denied, 130 S.Ct. 2097 (2010). His recourse was to seek review in the United States Supreme Court, which he did, albeit without success. See Smith v. Mullarkey, 547 U.S. 1071 (2006) (order denying certiorari). And his due process challenge to the Colorado Supreme Court's exercise of jurisdiction, on the ground that it ran afoul of Colorado's statutory scheme for appeals, falls squarely within the Rooker-Feldman doctrine. See Doe v. Mann, 415 F.3d 1038, 1042 n.6 (9th Cir. 2005) ("Rooker-Feldman applies where the plaintiff in federal court claims that the state court did not have jurisdiction to render a judgment.").

[36] In sum, we conclude that this appeal is legally frivolous because "it lacks an arguable basis in either fact or law," Thompson v. Gibson, 289 F.3d 1218, 1222 (10th Cir. 2002). The district court properly followed controlling precedent.

[37] II. 10-1012, Smith v. Anderson

[38] A. Background

[39] In Smith v. Anderson, Mr. Smith named as defendants the United States District Court for the

District of Colorado, three of that court's judges plus one "Judge Doe," and eight judges of this court plus twenty "Judge Does." He raised two claims. The first was "in the nature of a writ of scire facias,"*fn4 R., Vol. 1 at 5, ¶ 6, seeking to remove the defendant judges from their seats due to their alleged failure to maintain the "good Behaviour" required for continued tenure under Article III, section 1, clause 2 of the United States Constitution. In his second claim, he sought to prosecute crimes allegedly committed by the defendant judges against the United States. Mr. Smith claimed he had "inherent authority" to raise his first claim under "the Ninth and Tenth Amendments of the United States Constitution." Id. at 51, ¶ 255. With respect to his second claim, he contended he was "authorized to prosecute crimes committed against the United States by virtue of his inherent authority as co-sovereign, pursuant to powers reserved under the Ninth and Tenth Amendments, and crimes committed against his person and/or property in particular." Id. at 51-52, ¶ 259.*fn5

[40] As the factual basis for his claims, Mr. Smith alleged that defendants Anderson, Briscoe, Blackburn, Baldock, McConnell, Seymour, Tacha, Henry, and Kelly had either (1) intentionally and criminally disregarded binding Supreme Court and Tenth Circuit precedent; (2) delayed issuing a decision in one of his earlier appeals for 26 months; (3) failed to exercise de novo review of magistrate

judge recommendations and district court judgments; or, (4) motivated by "undue guild favoritism," R., Vol. 1 at 50, ¶ 245 (quotation marks omitted), summarily dismissed three complaints of judicial misconduct he had filed in the Tenth Circuit and one complaint filed by the plaintiff in a case in which Mr. Smith tried to file an amicus brief.

[41] With regard to defendant Krieger, Mr. Smith alleged that prior to her recusal in Krieger, she violated his due process rights by not permitting him to file an amended complaint as of right and by not enforcing a deadline against his opponents. He also alleged that in Bender, Judge Krieger's failure to recuse herself because of her alleged personal friendship and professional collaboration with one of the defendants was felonious, and that she had fabricated or elided facts in order to exercise jurisdiction.*fn6

[42] For substantive relief, Mr. Smith sought an order (1) removing the defendant judges from their offices; (2) convening a grand jury to hear evidence of federal crimes those judges and others allegedly committed; (3) compelling the Attorney General to provide supervisory counsel under 28 U.S.C. § 519; and (4) granting him leave to prosecute any indictments returned by the grand jury in the event the local United States Attorney refused to prosecute. He also asked for reasonable fees, expenses, and costs, including attorney fees.

[43] The defendants filed two motions to dismiss, which the district court granted under Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction, concluding that "[r]emoving judges from office . . . is the sole province of Congress. U.S. Const., art. I, § 2,3." R., Vol. 4 at 60. Regarding Mr. Smith's second claim, the district court determined that he lacked authority to proceed as a private attorney general on behalf of the United States because 28 U.S.C. § 519 vests that authority solely in the Attorney General and his delegates.

[44] The district court next proposed filing restrictions based in part on Mr. Smith's series of pro se lawsuits against the judges who had adversely decided cases against him, all stemming from the Colorado Supreme Court's order denying his application for admission to the Colorado bar. The court also noted Mr. Smith's penchant for making duplicative arguments in the same case, such as an emergency motion for relief in the nature of mandamus and two emergency motions for declaratory relief, all of which raised the same arguments found in his complaint and his responses to defendants' motions to dismiss. The court further observed that his filings had "become increasingly abusive. In at least one prior case in this Court, as well as in the two cases still pending before [the district court], Mr. Smith suggests that violence against federal judges may be justified if a litigant,

such as himself, does not get the relief he requests." Id. at 65. Based on this history, and over Mr. Smith's objections, the district court prohibited him from filing any new actions pro se in the United States District Court for the District of Colorado unless he first receives permission from that court to do so. The court also treated a post-judgment motion Mr. Smith had filed under Rule 59(e) as a Rule 60(b) motion and denied it.*fn7

[45] B. Discussion

[46] 1. Appellate Jurisdiction

[47] The district court issued its dismissal order in this case on November 19, 2009, and its separate judgment on November 23, 2009. On January 5, 2010, Mr. Smith filed a post-judgment motion, which contained his objections to the court's proposed filing restrictions. On January 13, 2010, the court overruled his objections to the filing restrictions and imposed them. The next day, January 14, 2010, Mr. Smith filed his notice of appeal, which read, in its substantive entirety:

[48] NOTICE IS HEREBY GIVEN that the United States of America, as represented by Kenneth L. Smith in propria persona in a relational capacity in the above-named cases, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Final Judgment entered herein on

November 23, 2009 (motions for post-judgment relief are still pending).

[49] Id. at 172. The NOA was timely with regard to the underlying judgment and the order imposing the filing restrictions. However, it does not designate that order as an object of this appeal, as required by Fed. R. App. P. 3(c)(1)(B), and Mr. Smith did not file another NOA or an amended NOA designating that order for appeal. But regardless of whether the NOA was compliant with Rule 3 as to the order imposing filing restrictions, Mr. Smith challenged the filing restrictions in his opening brief. See Aplt. Opening Br. at 60-67. That brief was filed on February 26, 2010, within sixty days of the order imposing the filing restrictions and therefore timely under Fed. R. App. P. 4(a)(1)(B). Further, it complied with all three requirements of Rule 3(c)(1). Therefore, we may treat it as the functional equivalent of an NOA from the order imposing filing restrictions, conferring jurisdiction on this court over that order. See Smith, 502 U.S. at 244-48.

[50] 2. Merits

[51] Having established that we have jurisdiction to review the district court's underlying judgment and its order imposing filing restrictions, we now turn to Mr. Smith's appellate arguments. Our review of a district court's order dismissing an action under Fed. R. Civ. P. 12(b)(1) is de novo, Colo.

Envtl. Coal. v. Wenker, 353 F.3d 1221, 1227 (10th Cir. 2004), and our review of the imposition of filing restrictions is for an abuse of discretion, Tripati v. Beaman, 878 F.2d 351, 354 (10th Cir. 1989).

[52] Regarding his first claim, Mr. Smith argues that impeachment is not the sole means of removing Article III judges who no longer exhibit the "good Behaviour" required for continued tenure under Article III of the Constitution. Instead, he argues, the Ninth and Tenth Amendments work to reserve to the people the right to remove such Article III judges. We disagree. Although the Constitution itself does not expressly limit removal of Article III judges to Congressional impeachment, the Supreme Court has taken that view. See N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59 (1982) (explaining that "[t]he 'good Behaviour' Clause guarantees that Art. III judges shall enjoy life tenure, subject only to removal by impeachment") (plurality opinion); United States ex rel. Toth v. Quarles, 350 U.S. 11, 16 (1955) (stating that "[Article III] courts are presided over by judges appointed for life, subject only to removal by impeachment"). For those "alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such judge is unable to discharge all the duties of office by reason of mental or physical disability," 28 U.S.C. § 351(a), Congress has established a statutory mechanism for

complaints of judicial misconduct that can culminate in Congressional impeachment proceedings. See 28 U.S.C. §§ 351-364.

[53] Mr. Smith's second claim fares no better than his first. Congress has by statute conferred the power to prosecute crimes in the name of the United States on the United States Attorney General and his delegates. See 28 U.S.C. §§ 516, 519. The long-standing view of the Supreme Court is that such power is exclusive. See, e.g., United States v. Nixon, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case") (emphasis added); id. at 694 ("Under the authority of Art. II, [§] 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government. 28 U.S.C. [§] 516."); The Confiscation Cases, 74 U.S. 454, 457 (1868) ("Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district attorney . . . .") (emphasis added). Therefore, as the district court concluded, Mr. Smith has no right to initiate a criminal prosecution in the name of the United States under the Ninth or Tenth Amendments, or otherwise.

[54] Finally, Mr. Smith contends that the district court's filing restrictions violate his First Amendment right of access to the courts and his due process rights, and he suggests that a finding of

frivolousness is essential to the imposition of filing restrictions. We have rejected these arguments. "[T]he right of access to the courts is neither absolute nor unconditional, and there is no constitutional right of access to the courts to prosecute an action that is frivolous or malicious." Tripati, 878 F.2d at 353 (citation omitted) (emphasis added). Federal courts have "power under 28 U.S.C. § 1651(a) to enjoin litigants who abuse the court system by harassing their opponents." Id. at 352. Thus, federal courts may "regulate the activities of abusive litigants by imposing carefully tailored restrictions under the appropriate circumstances." Id. (quotation omitted). Although "[l]itigiousness alone will not support an injunction restricting filing activities," filing restrictions "are proper where a litigant's abusive and lengthy history is properly set forth," id. at 353, the court provides guidelines as to what the litigant "must do to obtain the court's permission to file an action," and the litigant receives "notice and an opportunity to oppose the court's order before it is instituted," id. at 354.

[55] Here, the district court complied with all requirements for imposing filing restrictions. It recounted Mr. Smith's lengthy, abusive filing history, which we have alluded to throughout this decision and discuss below in greater detail. The court also provided Mr. Smith with pertinent guidelines for obtaining the court's permission to file

an action and with an opportunity to oppose the restrictions. Although the district court did not consider the case before it to be frivolous, it did not need to; abuse of the judicial process suffices. Indeed, having reviewed Mr. Smith's litigation history, we conclude that not only should the district court's filing restrictions be affirmed, but that a monetary sanction and filing restrictions in this court are warranted, and we now turn to those.

[56] III. Monetary Sanctions and Filing Restrictions

[57] Mr. Smith has had nine pro se cases decided adversely in courts of this circuit and the state of Colorado, each of which stemmed directly or indirectly from the denial of his bar application. In Mullarkey I and II, he sued the Colorado Supreme Court justices over that court's denial of his bar application. Unsuccessful, he then turned his sights on the constitutionality of unpublished judicial decisions issued by the Colorado Supreme Court and this court, specifically including our decision in Mullarkey I. See Smith v. U.S. Court of Appeals for the Tenth Circuit, 484 F.3d 1281, 1284 (10th Cir. 2007) (consolidated disposition of appeals in two cases). Again unsuccessful, he filed Bender, suing the Justices of the Colorado Supreme Court along with the attorney general and an assistant attorney general of the State of Colorado. The dismissal of that case was affirmed on the basis of sovereign and

qualified immunity, the Rooker-Feldman doctrine, and preclusion doctrine. See Bender, 350 F. App'x at 192-94. As discussed above, Mr. Smith also filed Krieger and Anderson, largely targeting judges who had issued rulings adverse to him in the prior cases.

[58] The same district judge who presided over Anderson has also dismissed two other cases Mr. Smith filed, and he has appealed one of those. The district court's decisions indicate Mr. Smith again challenged the process that the Colorado Supreme Court used in denying his admission to the Colorado bar and has continued his pattern of suing judges who have ruled against him. See Smith v. Arguello, No. 09-cv-02589-PAB, 2010 WL 1781937, at *1 (D. Colo. May 4, 2010), appeal docketed, No. 10-1280 (10th Cir. July 6, 2010); Smith v. Eid, No. 10-cv-00078-PAB, 2010 WL 1791549, at *1-*2 (D. Colo. May 4, 2010).*fn8

[59] Not only has Mr. Smith persisted down a futile path, the tenor of his court filings has turned increasingly abusive. We made note of this in Bender and warned Mr. Smith of the consequences:

[60] Mr. Smith's opening and reply briefs are littered with frivolous and irrelevant arguments and tirades. His briefs also contain scurrilous allegations and personal attacks regarding alleged wrongdoing by the named Justices of the Colorado Supreme Court and the district judge. . . . We admonish and

warn Mr. Smith that if he files future appeals in this court containing similar unsupported claims, allegations, or personal attacks, we will not hesitate to impose hefty sanctions and filing restrictions in order to curb his abusive and disrespectful litigation practices. Bender, 350 F. App'x at 195. Mr. Smith did not heed our warning, and we conclude that it is time to impose those "hefty sanctions and filing restrictions" we warned him about in Bender.

[61] "This court has the . . . inherent power to impose sanctions that are necessary to regulate the docket, promote judicial efficiency, and . . . to deter frivolous filings." Christensen v. Ward, 916 F.2d 1462, 1469 (10th Cir. 1990). Thus, we have ordered pro se appellants to make a monetary payment directly to this court "as a limited contribution to the United States for the cost and expenses of this action." Id. (imposing $500 sanction); see also Van Sickle, 791 F.2d at 1437 (imposing $1,500 sanction). Mr. Smith's appeal in Krieger is frivolous, and his appeal in Anderson borders on the frivolous. In both cases, and despite our warning in Bender, he has persisted in making unsupported allegations of judicial corruption, baseless claims, and personal attacks on the judges of the district court, this court, and several Justices of the United States Supreme Court and the Colorado Supreme Court. His briefs contain vulgar language, threats of lethal violence against judges rendering decisions he considers tyrannical, and tirades on a number of irrelevant

topics. Accordingly, we order Mr. Smith to show cause within ten days of the entry of this Order and Judgment why he should not be ordered to pay $3,000 to the Clerk of the United States Court of Appeals for the Tenth Circuit as a limited contribution to the United States for the costs and expenses of these appeals. See Sain v. Snyder, Nos. 09-2153, 09-2175, 2010 WL 1006589 (10th Cir. Mar. 19, 2010) (sanctioning pro se appellant $3,000 under reasoning of Christensen and Van Sickle), petition for cert. filed, 78 U.S.L.W. 3653 (U.S. Apr. 14, 2010) (No. 09-1332). The response shall not exceed five pages. If the response is not received by the Clerk within the specified ten days, the sanction will be imposed.

[62] Finally, as noted above, federal courts have the inherent power to impose carefully tailored filing restrictions. Tripati, 878 F.2d at 352. Based on Mr. Smith's "pattern of litigation activity[,] which is manifestly abusive," Winslow v. Hunter (In Re Winslow), 17 F.3d 314, 315 (10th Cir. 1994), we now impose filing restrictions. Given the contemptuousness and utter lack of propriety evidenced in his appellate filings, we do not limit the restrictions to any specific subject matter. Thus, in order to proceed pro se in this court in any appeal or original proceeding, Mr. Smith must provide this court with:

[63] 1. A list of all appeals or original proceedings

filed, whether currently pending or previously filed with this court, including the name, number, and citation, if applicable, of each case, and the current status or disposition of each appeal or original proceeding; and

[64] 2. A notarized affidavit, in proper legal form, that recites the issues he seeks to present, including a short discussion of the legal basis asserted therefor, and describing with particularity the order being challenged. The affidavit must also certify, to the best of Mr. Smith's knowledge, that the legal arguments being raised are not frivolous or made in bad faith; that they are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; that the appeal or original proceeding is not interposed for any improper purpose, such as delay or to needlessly increase the cost of litigation; and that he will comply with all appellate and local rules of this court.

[65] These filings shall be submitted to the Clerk of the court, who shall forward them for review to the Chief Judge or her designee, to determine whether to permit Mr. Smith to proceed with a pro se appeal or original proceeding. Without such authorization, the matter will be dismissed. If the Chief Judge or her designee authorizes a pro se appeal or original proceeding to proceed, an order shall be entered indicating that the matter shall

proceed in accordance with the Federal Rules of Appellate Procedure and the Tenth Circuit Rules.

[66] In addition, Mr. Smith shall not submit any further pleadings or motions in this court not specifically authorized by the Federal Rules of Appellate Procedure. In the event that such a motion or pleading is submitted, the Clerk of the court may return it to Mr. Smith unfiled.

[67] Mr. Smith shall have ten days from the date of this order and judgment to file written objections, limited to fifteen pages, to these proposed filing restrictions. If he does not file timely objections, the filing restrictions will take effect twenty days from the entry of this order and judgment. If he does file timely objections, these filing restrictions will not take effect unless the court overrules his objections, in which case these filing restrictions shall apply to any filing with this court after that ruling. Although Mr. Smith must comply with the Federal Rules of Appellate Procedure and the Tenth Circuit Rules in Smith v. Arguello, No. 10-1280, the filing restrictions shall have no other application to that matter.

[68] Conclusion

[69] For the foregoing reasons, we AFFIRM the district court's denial of Mr. Smith's Post-Judgment Motion in No. 09-1503. In No. 10-1012, we AFFIRM

the district court's judgment and its order imposing filing restrictions. Further, we ORDER Mr. Smith to show cause why he should not be sanctioned and why filing restrictions should not be imposed, as set forth herein.

Opinion Footnotes

[70] *fn1 After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[71] *fn2 "The Rooker-Feldman doctrine prevents the lower federal courts from exercising jurisdiction over cases brought by state-court losers challenging state-court judgments rendered before the district court proceedings commenced." Lance v. Dennis, 546 U.S. 459, 460 (2006) (quotation omitted). This court previously relied on the Rooker-Feldman doctrine in rejecting Mr. Smith's challenge to the Colorado Supreme Court's denial of his bar application. See Mullarkey I, 67 F. App'x at 538.

[72] *fn3 Amendments to the Federal Rules of Civil and Appellate Procedure took effect December 1, 2009, and provide longer time periods under Fed. R. Civ. P. 59(e) and Fed. R. App. P. 4(a)(4)(vi) that would likely lead to the conclusion that we have jurisdiction over Mr. Smith's appeal from the district court's underlying judgment. However, in this appeal, we apply the version of those rules in effect at the time Mr. Smith filed his Post-Judgment Motion and his NOA because the filing deadlines those rules contain expired prior to the effective date of the revisions. See Ysais v. Richardson, 603 F.3d 1175, 1178 n.3 (10th Cir. 2010) (applying prior version of Rule 59 because ten-day period for filing Rule 59 motion had expired prior to effective date of the 2009 amendments), petition for cert. filed (U.S. June 10, 2010) (No. 09-11225).

[73] *fn4 Scire facias, meaning "'you are to make known, show cause,'" was "[a] writ requiring the person against whom it issued to appear and show cause why some matter of record should not be annulled or vacated, or why a dormant judgment against that person should not be revived." Black's Law Dictionary 1464 (9th ed. 2009). Although the writ is now abolished, "[r]elief previously available through [it] may be obtained by appropriate action or motion under these rules." Fed. R. Civ. P. 81(b).

[74] *fn5 The Ninth Amendment provides: "The

enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[75] *fn6 Although Mr. Smith named the Honorable Wiley Y. Daniel as a defendant, he made no allegations regarding Judge Daniel other than to note that defendant "Judge Doe" would likely succeed Judge Daniel upon the latter's recusal from another case Mr. Smith had filed.

[76] *fn7 Mr. Smith has not taken issue with the denial of his Rule 60(b) motion, so we do not consider it any further.

[77] *fn8 According to the district court's decision in Arguello, Mr. Smith also claimed that opposing counsel in prior suits violated his constitutional rights by seeking sanctions against him, and he challenged "his inclusion on a 'threat list' which prevents him from entering courthouses without 'harassment' by U.S. Marshals." Arguello, No. 09-cv-02589-PAB, 2010 WL 1781937, at *1.

Exhibit 2

---

[1] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

[2] Civil Action No. 09-cv-01018-PAB

[3] 2009.DCO.0006409< http://www.versuslaw.com>

[4] November 19, 2009

[5] KENNETH L. SMITH, PLAINTIFF, [SIC]
v.
STEPHEN H. ANDERSON, ET AL.,
DEFENDANTS.

[6] The opinion of the court was delivered by: Philip A. Brimmer United States District Judge

[7] Judge Philip A. Brimmer

[8] ORDER

[9] This matter comes before the Court on defendants' motions to dismiss [Docket Nos. 7, 11] plaintiff's complaint ("Compl.") [Docket No. 1]. The motions have been fully briefed and are ripe for disposition.

[10] I. MOTIONS TO DISMISS

[11] A. Standard of Review

[12] Dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1) is appropriate if the Court lacks subject matter jurisdiction over claims for relief asserted in the complaint. When there is a "facial attack on the complaint's allegations as to subject matter jurisdiction," the Court "must accept the allegations in the complaint as true." Holt v. United States, 46 F.3d 1000, 1002 (10th Cir.1995). However, "[t]he burden of establishing subject matter jurisdiction is on the party asserting jurisdiction." Port City Props. v. Union Pac. R.R. Co., 518 F.3d 1186, 1189 (10th Cir. 2008).

[13] Dismissal of a claim under Rule 12(b)(6) is appropriate where the plaintiff fails to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). For a complaint to state a claim it must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. (8)(a)(2). Rule 8(a)'s "short and plain statement" mandate requires that a plaintiff allege enough factual matter that, taken as true, makes his "claim to relief . . . plausible on its face." Bryson v. Gonzales, 534 F.3d 1282, 1286 (10th Cir. 2008) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

[14] "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's Complaint alone is legally sufficient to state a claim for which relief may be granted." Dubbs v. Head Start, Inc., 336 F.3d 1194, 1201 (10th Cir. 2003). In doing so, the Court "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." Alvarado v. KOB-TV, L.L.C., 493 F.3d 1210, 1215 (10th Cir. 2007). At the same time, however, a court need not accept conclusory allegations. Moffet v. Halliburton Energy Servs., Inc., 291 F.3d 1227, 1232 (10th Cir. 2002).

[15] Generally, "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the claim is and the grounds upon which it rests.'" Erickson v. Pardus, 551 U.S. 89, 93 (2007) (per curiam) (quoting Twombly, 550 U.S. at 555) (omission marks omitted). The "plausibility" standard requires that relief must plausibly follow from the facts alleged, not that the facts themselves be plausible. Bryson, 534 F.3d at 1286.

[16] However, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged -- but it has not shown -- that the pleader is entitled to relief." Ashcroft v. Iqbal, --- U.S. ----, 129 S.Ct. 1937, 1950 (2009) (internal quotation marks and

alteration marks omitted). Thus, even though modern rules of pleading are somewhat forgiving, "a complaint still must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." Bryson, 534 F.3d at 1286 (alteration marks omitted).

[17] B. Discussion

[18] Plaintiff's complaint raises two claims for relief. In the first, he seeks the removal of defendant judges from their positions on the United States Court of Appeals for the Tenth Circuit and the United States District Court for the District of Colorado. He attempts to invoke Section 1 of Article III of the Constitution, which provides that "judges, both of the supreme and inferior courts, shall hold their offices during good behaviour." U.S. Const., art. III, § 1. Removing judges from office, however, is the sole province of Congress. U.S. Const., art. I, §§ 2, 3. While an individual may file a complaint alleging judicial misconduct with the clerk of the appropriate court of appeals, see 28 U.S.C. § 351(a), the judicial branch is not empowered to remove a judge from office. See 28 U.S.C. § 354(a)(3)(A) ("Under no circumstances may the judicial council order removal from office of any judge appointed to hold office during good behavior."). Again, only Congress may do so. Cf. 28 U.S.C. § 355(b)(1). In short, this Court lacks the power to act in the

fashion plaintiff's complaint requests.*fn1

[19] In his second claim for relief, plaintiff claims the authority to proceed as a private attorney general to act on behalf of the United States to initiate a criminal prosecution. The Court disagrees. As plaintiff cites in his complaint, Section 519 of Title 28 of the United States Code clearly provides that:

[20] Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

[21] Plaintiff contends that the authority to act as a private attorney general is authorized "pursuant to powers reserved under the Ninth and Tenth Amendments." Compl. at 48-49, ¶ 259. The Court finds no basis for this claim.*fn2 Furthermore, to the extent plaintiff seeks to represent the general interest of the public in the functioning of the judicial system, he lacks standing to do so. See Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997) ("An interest shared generally with the public at large in the proper application of the Constitution and laws will not do.").*fn3

[22] II. FILING RESTRICTIONS PURSUANT TO 28 U.S.C. § 1651(a)

[23] In their motion to dismiss [Docket No. 7], the District Court and Federal Appellate Defendants have requested that the Court impose filing restrictions upon plaintiff. "A district court has power under 28 U.S.C. § 1651(a) to enjoin litigants who abuse the court system by harassing their opponents." Tripati v. Beaman, 878 F.2d 351, 352 (10th Cir. 1989) (collecting cases). Furthermore, "[f]ederal courts have the inherent power to regulate the activities of abusive litigants by imposing carefully tailored restrictions in appropriate circumstances." Andrews v. Heaton,483 F.3d 1070, 1077 (10th Cir. 2007) (citing Sieverding v. Colo. Bar Ass'n., 469 F.3d 1340, 1343 (10th Cir. 2006)); see Howard v. Mail-Well Envelope Co., 150 F.3d 1227, 1232 (10th Cir. 1998); Tripati, 878 F.2d at 352. The nature of plaintiff's claims and pleadings in this case and other cases he has filed constitute appropriate circumstances.

[24] Plaintiff has a long history of filing lawsuits. As noted in Smith v. Mullarkey, 121 P.3d 890, 891 (Colo. 2005), the Colorado Supreme Court "issued an order denying Mr. Smith's application [for admission to the Colorado bar] on January 13, 2000. Mr. Smith did not seek certiorari review of that decision with the United States Supreme Court." Plaintiff then "filed a series of lawsuits, first in

federal district court and then in Denver District Court. In those actions, he challenged the denial of his application for admission under 42 U.S.C. § 1983, as a violation of his First, Fourth and Fourteenth Amendment rights." Id. at 891.The Colorado Supreme Court in Smith v. Mullarkey affirmed the Denver District Court dismissal of Mr. Smith's claims for lack of subject matter jurisdiction. See id. at 893 ("The Colorado Supreme Court's order denying admission . . . became final when the time for filing a petition for writ of certiorari expired.").

[25] Mr. Smith's first federal lawsuit was apparently the same suit he had brought in Denver District Court, wherein he sued the Colorado Bar of Law Examiners and the Justices of the Colorado Supreme Court. See Smith v. Mullarkey, 00-cv-02225-EWNOES. The district court dismissed the case, see Docket No. 32, 00-cv-02225-EWNOES; the Tenth Circuit affirmed the dismissal; and the United States Supreme Court denied review. On June 14, 2004, Mr. Smith filed two more federal cases, Smith v. United States Court of Appeals for the Tenth Circuit, 04-cv-01222-REB-OES, and Smith v. Mullarkey, 04-cv-01223-REB-OES, both of which "stemm[ed] from the denial of his application for admission to the Colorado bar." Smith v. United States Court of Appeals for the Tenth Circuit, 484 F.3d 1281, 1283 (10th Cir. 2007). The district court dismissed both cases, and the Tenth Circuit

affirmed the consolidated dismissals on appeal. See id. The United States Supreme Court denied certiorari.

[26] On September 12, 2007, Mr. Smith filed Smith v. Bender, 07-cv-01924-MSKKMT, again suing the Justices of the Colorado Supreme Court. The district court dismissed the case, and the Tenth Circuit affirmed on September 11, 2009. During the pendency of that action, Mr. Smith filed Smith v. Krieger, et al., 08-cv-00251-CMA-KMT, where he sued United States District Judge Marcia S. Krieger, who was then presiding over Smith v. Bender. In that case, "[p]laintiff challenge[d] his treatment by the state and federal courts in his earlier lawsuits, and br[ought] claims for violation of his Fifth and Fourteenth Amendment rights to due process, his Fifth and Fourteenth Amendment rights to equal protection, and his First Amendment right of access to the courts." Smith v. Krieger, No. 08-cv-00251-CMA-KMT, 2009 WL 2407643, at *1 (D. Colo. Aug. 3, 2009). The district court granted the defendants' motions to dismiss, and plaintiff filed a notice of appeal on November 6, 2009.

[27] During the pendency of Smith v. Krieger, Mr. Smith filed this case against certain judges of the United States District Court for the District of Colorado and the United States Court of Appeals for the Tenth Circuit, seeking their removal from office and asserting the right to act as a private attorney

general to prosecute them criminally for, essentially, their rejection of his prior claims. While this action was still pending, Mr. Smith filed Smith v. Arguello, 09-cv-02589-PAB, suing United States District Judge Christine M. Arguello, who dismissed his lawsuit in Smith v. Krieger, as well as various other federal judges of the Tenth Circuit and this District who presided over the aforementioned lawsuits and appeals. On October 6, 2009, Mr. Smith filed suit in the United States District Court for the District of Columbia. That case is apparently related to the two pending cases in this District. See Pl.'s Notice of Related Litigation and Motion for Stay of All Proceedings [Docket No. 38]. In summary, plaintiff has persisted in filing new causes of action despite the prior adjudication of related complaints.

[28] Mr. Smith has also shown a penchant for making duplicative arguments. For example, in this case, he has filed a 104-page Emergency Ex Parte Motion for Relief in the Nature of Mandamus [Docket No. 2], Emergency Motion for Declaratory Relief [Docket No. 17], and Second Emergency Motion for Declaratory Relief [Docket No. 18], which all raise the same arguments that are found in his complaint and responses to the motions to dismiss.

[29] Furthermore, plaintiff's submissions have become increasingly abusive. In at least one prior case in this Court, as well as in the two cases still

pending before this Court, Mr. Smith suggests that violence against federal judges may be justified if a litigant, such as himself, does not get the relief he requests. See, e.g., Pl.'s Resp. to Defs.' Mot. to Dismiss [Docket No. 12] at 6; Pl's Emergency Ex Parte Motion for Declaratory and/or Injunctive Relief in No. 09-cv-02589-PAB [Docket No. 5] at 8-10, 13-14; Order to Seal Pl.'s Mot. to Alter or Amend J. in No. 08-cv-00251 [Docket No. 113] (sealing filing "due to its inflammatory statements"). Mr. Smith's abusive language has not been confined to this Court. The Tenth Circuit Court of Appeals has warned Mr. Smith about his "frivolous and irrelevant arguments and tirades." Smith v. Bender, No. 09-1003, 2009 WL 2902563, at *4 (10th Cir. Sep. 11, 2009) ("His briefs also contain scurrilous allegations and personal attacks regarding alleged wrongdoing by the named Justices of the Colorado Supreme Court and the district judge. We admonish and warn Mr. Smith that if he files future appeals in this court containing similar unsupported claims, allegations, or personal attacks, we will not hesitate to impose hefty sanctions and filing restrictions in order to curb his abusive and disrespectful litigation practices."). Despite that clear warning, plaintiff persists in bringing lawsuits arising out of the same set of circumstances.

[30] While Mr. Smith's requests for relief have to some extent evolved with each new lawsuit, his cases all stem from his underlying failure to be

admitted to the Colorado bar.*fn4 He has turned from filing lawsuits over that denial to bringing actions against the judicial officers who dismissed his last lawsuit or appeal. There will be no end if plaintiff is permitted to continue filing actions that argue that a failure to receive his desired outcome in a lawsuit is grounds for filing yet another.

[31] Therefore, the Court will impose prospective filing restrictions on Mr. Smith. The filing restrictions will be "narrowly tailored, at least in the first instance." Andrews,483 F.3d at 1077. Mr. Smith will not be permitted to file new actions in this Court without the representation of a licenced attorney admitted to practice in the District of Colorado. The requirement that he have such counsel will be lifted only if he has obtained permission from this Court to proceed pro se. In order to obtain such permission, he must take the following steps:

[32] 1. File a motion with the clerk of this Court requesting leave to file a pro se case;

[33] 2. The motion for leave to proceed pro se must include a list, by case name, number, and citation where applicable, of all proceedings currently pending or filed previously in this Court, with a statement indicating the nature of his involvement in, and the current status or disposition of, each proceeding.

[34] 3. The motion for leave to proceed pro se must identify the legal issues that the proposed new complaint raises and whether he has raised these issues in other proceedings in this Court. If so, he must cite the case number and docket number where such legal issues have been previously raised.

[35] If Mr. Smith files a pro se action without permission of this Court to do so, it will be summarily dismissed.

[36] III. CONCLUSION

[37] For the foregoing reasons, it is

[38] ORDERED that defendants' motions to dismiss [Docket Nos. 7, 11] are GRANTED. Plaintiff's claims are dismissed with prejudice. It is further

[39] ORDERED that the clerk shall forthwith enter judgment in favor of defendants and against plaintiff. Defendants may have their costs by filing a bill of costs pursuant to Local Rule 54.1. It is further

[40] ORDERED that plaintiff's Emergency Ex Parte Motion for Relief in the Nature of Mandamus [Docket No. 2], Emergency Motion for Declaratory Relief [Docket No. 17], and Second Emergency Motion for Declaratory Relief [Docket No. 18] are

DENIED. It is further

[41] ORDERED that plaintiff's Ex Parte Motion for Taking of Judicial Notice [Docket No. 3], Emergency Motion for Service by United States Marshal [Docket No. 37], and Notice of Related Litigation and Motion for Stay of All Proceedings [Docket No. 38] are denied as moot. It is further

[42] ORDERED that defendants' motions to stay [Docket Nos. 8, 15] are denied as moot. It is further

[43] ORDERED that plaintiff's motion for extension of time to file a response [Docket No. 9] is deemed moot in light of the Court's acceptance of the relevant filing on October 13, 2009 [Docket No. 12]. It is further

[44] ORDERED that, in light of plaintiff's representation to the Court that he will be out of the country until December 19, 2009 [Docket No. 46], plaintiff shall have until January 5, 2010 to file written objections to the proposed filing restrictions; such objections shall be limited to 15 pages. In the absence of timely objections, the restrictions shall take effect on January 15, 2010. If plaintiff does file timely objections, the restrictions shall not take effect until the Court rules on the objections or January 15, 2010, whichever is later. Nothing in this Order shall be construed as preventing plaintiff, in compliance with Federal Rule of Civil Procedure

11(b), from filing or responding to any motions in the pending case Smith v. Arguello, et al., No. 09-cv-02589-PAB. It is further

[45] ORDERED that the motion for sanctions [Docket No. 42] is DENIED as moot in light of the foregoing. It is further

[46] ORDERED that the motion to seal [Docket No. 40] is GRANTED in light of the filing's inclusion of materials from a sealed document in a now-closed case in this Court. It is further

[47] ORDERED that any other pending motions are denied as moot.

Opinion Footnotes

[48] *fn1 Plaintiff also requests issuance of a writ of scire facias. See, however,Fed. R. Civ. P. 81(b) ("The writs of scire facias and mandamus are abolished. Relief previously available through them may be obtained by appropriate action or motion under these rules.").

[49] *fn2 See Jenkins v. C.I.R., 483 F.3d 90, 92 (2d Cir. 2007) ("'The Ninth Amendment is not an independent source of individual rights; rather, it provides a 'rule of construction' that we apply in certain cases.") (citations omitted); United States v.

Parker, 362 F.3d 1279, 1284 (10th Cir. 2004) ("In Mountain States Legal Foundation v. Costle, 630 F.2d 754, 761 (10th Cir. 1980), we held that private plaintiffs do not have standing to bring Tenth Amendment claims when their interests are not aligned with the state's interests."); Gibson v. Matthews, 926 F.2d 532, 537 (6th Cir. 1991) ("[T]he ninth amendment does not confer substantive rights in addition to those conferred by other portions of our governing law.").

[50] *fn3 Having so found, the Court does not reach defendants' other arguments for dismissal.

[51] *fn4 Cf. Winslow v. Romer, 759 F. Supp. 670, 678 (D. Colo. 1991) ("A review of these actions indicates that nearly every one can be traced, directly or indirectly, to the Morgan County case. By filing repetitive, often frivolous pleadings, Winslow demonstrates his failure to comprehend fundamental principles of jurisdiction, stare decisis and res judicata. Winslow's filings are many times incorrect in procedure and form, and he often attempts to evade the court's final ruling on a matter by filing multiple motions for reconsideration. Once having commenced an action, he seeks to expand the proceedings to include matters outside the scope of the original complaint and, often, outside the court's jurisdiction.").